THE

REPORTS

Of that Reverend and Learned

JUDGE,

The Right Honourable

Sr. HENRY HOBART

Knght and Baronet, Lord Chief
Juſtice of His MAJESTY's

Court of Common Pleas,

An Chancellor to both Their Highneſſes

HENRY and CHARLES

PRINCES of WALES.

The Fifth Edition.

Review'd and Corrected from the Errors of all former Impreſons; with an Addition of many Thouſands of new References, by *Edward Chilton* late of the *Middle-Temple* Eſq;.

With an exat Alphabetical TABLE, by an Honourable and Learned Hand.

In the *SAVOY:*

Printed by E. and R. NUTT and R. GOSLING, (Aſſigns of *Edward Sayer* Eſq;) for R. Gosling at the *Middle-Temple-Gate* in *Fleetſtreet*, and T. Ward in the *Inner-Temle-Lane.*

MDCCXXIV.

TO THE

READER.

THE Commentaries of this moſt Excellent and Famous Judge, having formerly ſuffered the Misfortune of a Rude and Unskilful Expoſer, who aiming more at his private Gain than the Good of the Nation, Honour of the Law, and Renown of the Author, Printed them; and then, without Conſulting with any, that either knew the Laws, or were acquainted with the Author's moſt excellent Style, publiſhed them deformed, without any Correction: Which, when Extant, ſeemed Beauteous in their Confuſion. However, to wipe off the Duſt from this moſt excellent Jewel, an Honourable and a Learned Hand hath, out of a Reſpect to the Aſhes of the Learned Author, beſtowed more than a few Hours in the Peruſing and Amending the Unhappy Miſtakes; and, as in a Perſpect, to behold the Body of theſe moſt excellent Commentaries, hath compiled a Table worthy to be annexed to the Works of the Learned HOBART. *The Ancients (though Barbarous, as Sir* Walter

History of the World, Lib. 2. Sect. 3.

Rawleigh *obſerveth*) *had Laws in ſo high an Eſteem, that thoſe, whoſe Wiſdoms had ſingled out to be the firſt Founders of them, were honoured as Gods: And others, that made either Additions or Corrections, were commended to all Poſterity for Men of no leſs Vertue, and no leſs liberally Beneficial to their Countrey. than the Greateſt and moſt Proſperous Conquerors that ever governed them. If ſo ſacred a Reverence, and glorious an Eſteem, were given by Heathens to ſuch, what Tribute ſhall be paid to the Memory of the Author and Compleater of theſe moſt Excellent Pieces? Doubtleſs,* Divinos Hymnos canere, & Leges Patrias, Magnorumque geſta Virorum graviter recenſere, *cannot be ill employed. However I ſhall, whilſt I Live, have them in great Eſteem, and ſubſcribe my ſelf,*

Your Humble Servant,

C. M.

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I Have peruſed this Treatiſe, called, The Lord *HOBART*'s REPORTS; and I conceive the Printing of it will be for the Good of the Kingdom, and the Common Law.

June 13. 1646. Car. 22.

PHILIP JERMIN.

REPORTS

OF

Sr. HENRY HOBART,

Lord Chief Justice

OF THE

COMMON PLEAS.

(1)

Richard *Earl of* Clanrickard, *and the Lady* Francis *his Wife*, *against* Robert Sidney.

Suſſex. Mich. 11. Jac. Rot. 66.

" RICHARD Earl of Clanrickard, and the Lady Francis his Wife, brought a Formedon in Reverter against Robert Sidney Viſcount Liſle, of divers Meſſuages, Lands and Tenements in Ewhurſt, Watlington, and other Towns, which Robert Earl of Eſſex, and the ſaid Francis then his Wife, by Fine did give unto William Gerard " and Francis Mill, and the Heirs of the ſaid William, to the Uſe of Elizabeth " Sidney, Daughter and Heir of Sir Philip Sidney Knight, and the Heirs of " her Body, and for Default of ſuch Iſſue, to the Uſe of the ſaid Lady Francis, " and her Heirs: Et quæ poſt mortem præd. Eliz. ad præfatam Franc. revertere " debent per formam donationis præd. ac vigore Stat. &c. eo quod præd. Elizabetha " obiit ſine hæred. de corpore ſuo exeun.

Formedon in reverter, to the Husband and Wife, by the Wife Brownl. 1. 154. Poſt. 46. B. Amendment 12. Hutt. 43. Br. Entr. in Leper, 12.

" Whereupon the ſaid Earl and Counteſs counted accordingly; and the " Viſcount Liſle Defendant pleaded in Abatement of the Writ, that the " ſaid Counteſs, at the Time of the Death of the ſaid Elizabeth, was covert of " the Plaintiff her now Husband, ſo that the Right of the ſaid Tenements, " ſi quod, &c. to her Husband and her did revert, and ſo by the ſaid Writ it " ought to have been ſuppoſed; whereupon the Demandants demurred in " Law: And it was adjudged for them, that the Writ was ſufficient.

Demurrer. Poſt. 329.

And in this Caſe theſe differences were obſerved; That if it were a Formedon in Deſcender, upon a Deſcent to the Wife, there the Deſcent muſt be made in the Writ to the Wife alone, for the Deſcent followeth the Blood; and to that the Husband is a Stranger; and ſo is the Book of 19 H. 6. 46. and 35 H. 6. fol. 10. 13. where a Formedon in Deſcender was brought by two Huſbands and their Wives, and made the Deſcent in Blood to the Wives only; and yet concluded, that the Right ought to deſcend to the Husbands and their Wives: And Exception taken to it, and ordered by the Court, that it ſhould be amended, and the Deſcent made only to the Wives: On the other Side, in a Ceſſavit by the Husband and the Wife, or a Writ of Eſcheat, a Conſimili caſu, or Action of Waſte, becauſe there is veſted in them already either a Signiory or Reverſion actually, and therefore the Land holden, or the preſent Eſtate to return, is to come into Poſſeſſion, therefore in thoſe Caſes the Reverter is to be made to them both, and ſo are the Books, 3 H. 6. 2. 20 E. 3, Brief 372. Regiſter 238. Nat. Br. 210.

Differences. B. Formedon, 364. Breife, 34. 19 H. 7. 19. per Keble co. 8. 88.

19 H. 6. 46. 35 H. 6. fol. 10. 13. 2 H. 7. 11. Sci. Fac. 28. Faux Forma. Br. 7. Waſt B. 6. 18. E. 3. 26. p. 8.

3 H. 6. 2. 20 E. 3. bre. 372. Reg. 138. Nat. Br. 210.

6 E. 3. 26. p. 67. 11 H. 4. 15. Br. Baron & Feme, 35. 33 H. 6. fo. 54. 18 H. 6. 20. 3 H. 5. 13. 38 E. 3. 16. 18 E. 3. 3.

But now in a Formedon in Reverter, wherein nothing is already invested, but the Right only returns, there the Right may be laid to return either to the Wife alone, or to the Husband and Wife, as Danby resolves plainly in 33 H. 6. fo. 54. vide auxi quelque fois al Femme quelque fois tant al baron que Femme 18 H. 6. 20. 5 H. 5. 13. 38 E. 3. 16. & 18 E. 3. 3 Report de R. Thorpe & ceo cas d'un carbonel, breve fuit abate pur ceo que le Reverter fuit mis tant al Baron & Femme.

Trns.

(2) Walter Widlake *versus* Harding.

Somerset. Hill. 8. Jac. Rot. 269

Devise to A. for Years, and the Inheritance gives Fee.

Br. Estate 5. Roll. 1. Abrid. 835. Moor 823. Godb. 207. 2 Cro. 49. Judgment.

" WAlter Widlake brought an Action of Trespass against Agnes Harding, " for taking of a Porrenger at Basington. The Defendant pleaded, " that one John Francklin was seiz'd of an House and Land in Basington in " Fee-simple, holden in Socage, and leased it to the Plaintiff for 99 Years, " yielding seven Shillings a Year Rent quarterly, by even Portions: " And after by his Will did devise the Reversion to Agnes Harding, and her " Heirs, in Fee-simple; and that for a Quarter's Rent behind, she distrained " the Porrenger in the House devised: The Plaintiff confessing the Seisin of " Francklin, and the Lease to himself, and the Death of John Francklin, con- " veyed the Reversion to Edw. Francklin by Descent, and traversed the De- " vise to the Defendant, modo & forma. The Jury find that John Francklin " did devise the House and Land to Agnes in these Words, viz. Item, I do " give and bequeath unto my Cousin Agnes Harding, and her Assigns, my " now dwelling House, with all the Lands belonging to it, for the Term " of Ninety nine Years: And my said Cousin Agnes Harding shall have " my Inheritance, if the Law will allow it: And they found the Rent be- " hind, and that she had distrained the Dish for the Rent, and it was ad- " judged for Agnes Harding, that the Devise gave the Land to her and her Heirs.

(3) Incerti Nominis & Temporis.

Banc. le Roy.

Divers Executions upon joint and several Obligations.

MOnsignior Coke, Chief Justice, reporta ceux Points in Capias in Banco Regis, That when two are bound in Obligation jointly and severally, and the Obligee sue one of them in the Common Pleas, and the other in the King's Bench, and had against him in the King's Bench a Capias, and took him in Execution, and after took an Elegit against the other, and had Lands and Goods delivered in Execution, as he might well, that thereupon the other in Execution by his Body had an Audita Querela, and was delivered: And because the Judgment in that Case must be, that he be discharged of the Execution, he shall never be taken again, though the Land taken in Execution be evicted.

Elegit Peremptory.

V. Pasc. 12. Jac. in B.R. In *Cowley* and *Legatt's* Case: it was agreed by the whole Court (according to the Opinion in this Case) That a Capias doth not lie after Execution sued forth upon Elegit against the same Person; the Reason is, because upon the Prayer of the Party to have an *Elegit*, it is entred upon the Roll, *Elegit sibi executionem per meditatem Terre*, so as here is estopped by the Record, to have another Execution. But by the Opinion of *Hobart* in *Foster* and *Jackson's* Case here, fo. 57. that must be intended when the first Writ is returned served; but it upon it *Nihil* be returned, then a *Capias* will lie against the Party, notwithstanding the *Elegit* sued forth. Bulst. 2d R. fo. 97. Keeb. 1 R. 71. p. 41. Mod. 91. p. 74. Godb. 181. Br. det 49, 257, 258. 5 Rep. 87. Blomfield's Case 2 Cro. 60. ap. 57. 60. Rolls. Abr. 308. Br. excon 96. B. audita quer. 42. Co. 6. 46. H. Yel. 67. Le. 1. 51. p. 65. Ro. 1. 904. 85. 3 Cro. 160. Br. Execution 99. B. Elegit 15. 21 H. 7. 19. t Br. Execution 72. Br. Elegit 11. 17. E. 44. Br. Scire Facias 187. Mo. 545. Cro. Jac. 338. g. 3 Cro. 169. Rolls. R. f. 8. Ro. 1. Ab. 896. Codb. 257, 208. Dy. 299. b. 7 H. 6. 27. Error 14. Br. 67. Ro. 1. 904. Execution Br. 123, 132, 145. Dalt. Sher. 59.

Cornwall.

(4) John Thomas *versus* Axworth.

Com. Pleas. Pasch. 12 Jac. Rot. 352. Brownl. R. 4. Ro. 1. 66. Syd. 16.

" IN an Action upon the Case in the Common Pleas, by John Thomas " an Attorney, against Axworth, for these Words, This is J. Thomas " his Writing, Innuendo the Plaintiff, and he Innuendo, &c. hath forged " this Warrant." Quoddam warrantum per quendam Richardum Buller Mil. tunc Vic. Com. præd. existen. super quoddam breve de Capias per quand. Margaret. Hog. versus præf. def. extra Cur. de Banco prosecut. eid. Vic. direct. Innuendo upon not guilty pleaded, and found for the Plaintiff. It was moved in Arrest of Judgment, that the Innuendo would not support the Action, was the word Warrant

Innuendo will not inlarge Words. Cro. Car. 74. Cro. Jac. 648.

rant alone being of uncertain Senſe, and the Matter of the Action ſhall not be enlarged nor aſcertained by the Innuendo, as Pox Innuendo the French Pox; of which Opinion I was, and am. And note, that after in Trinity Term, in the Cauſe of Yardly and Elhill this Caſe was vouched, as adjudged according to my Opinion, by Juſtice Nicholls and Winch. But it was not adjudged: but that ſhews their Opinions were concurring with me.

Yel. 11. Acc. Hurt. 8. Poſt. 45, 268, 305. 4 Co. 17, b. 20, a. Acc. Moor. 855. Cr. Jac. 673.

(5) Yong *verſus* Radford.

Ejectione.

EJectione firme by Charles Yong againſt Robert Radford, of a Houſe and Garden in Long-ditch in Weſtminſter, of the Demiſe of Anne Holland, upon Iſſue not Guilty, by ſpecial Verdict, the Caſe was found thus.

Paſch. 11. Jac. Rot. 1515. Brownlow. Middleſex. Winch. Ent. 457. 1 Roll. 345. The Wives Leaſe mortgaged by her Husband. Brent. 129,

" Elizabeth Radford was poſſeſſed of a Leaſe of the Lands in queſtion, of " the Demiſe of the Dean and Chapter of Weſtminſter, for Thirty one Years, " beginning the fifth of December 35th Year of the Queen, and married one " John Holland, and then he and his Wife mortgaged their Intereſt, and " term of Years, unto one John Emerſon, for payment of two and Twenty " Pounds; and after, and before the Day of Payment, Elizabeth died, and " John Holland the Husband paid the Money at the Day, in redemption " of the Mortgage, and entred, and made Anne his Wife his Executrix, " who entred, and then Radford took Adminiſtration of the Goods of Eli- " zabeth the Wife of John Holland, and entred upon the Leſſee, upon whom " the ſaid Anne re-entred, and made the Leaſe unto Yong the Plaintiff, " who entred and was poſſeſſed, 'till the Defendant Radford ejected him. " And it was adjudged, that the Plaintiff ſhould recover by our uniform " Opinion." The Judgment was pronounced P. 12. the Reaſon was, that though the Leaſe was at the firſt the Wife's, and that the Husband was poſſeſſed in her Right, ſo as though he had purchaſed the Fee ſimple, the Leaſe had not been extinct, yet by the Entermarriage he hath full Power to alien it: And if he ſurvive his Wife, he is to enjoy it, againſt her Executors or Adminiſtrators; ſo here, when he ſurvives, the Condition ſurvives to him, and reſtores him to the Leaſe in State, as it ſhould have been, if it had not been alienedd. Like to the Caſe of 35 Aſſ plac. 15. where the Huſband and the Wife, and a third Perſon, purchaſe Lands jointly, the Huſband alienedd the whole, and then he and his Wife died, the third Perſon ſurviving had an Aſſize of the whole. And the rather here, becauſe the Husband paid all the Money, after the Death of the Wife; like the Caſe 9 H. 7. 25. agreed in Shellies Caſe: If a Man make a Feoffment of Lands upon Condition, that if the Feoffor, or his Heirs, pay Ten Pounds, that he may re-enter, and die leaving a Daughter, who paid the Money and enters, and then a Son is Born, yet the Daughter ſhall retain the Lands. For qui ſentit onus, ſentire debet commodum.

Judgment. Cr. Jac. 275, 141. Co. 338. b. Plo. 418. Co. L. 46. b. 351. a. b. 219. b. Cro. Car. 344. Ap. 327. Ro. 1. 345. Plo. 192. 1. Co. L. 464. Dy. 251. P. 90. 3 Cr. 912. 2 Cr. 275.

9 H. 7. 25. Co. 1. 95. 1. 99. 1. Cr. Car. 81. Swinb. 34. Co. L. 188. 11. b. Tr. 15. Car. I. in B. R. the Lady *Cromwell* was poſſeſſed of divers Leaſes, and conveyed them in Truſt. It was the Opinion of the Juſtices, that by the Receipt the Husband had a Property therein as Husband, and might diſpoſe thereof at his Pleaſure, and therefore, though he after took Letters of Adminiſtration of his Wives Goods, yet he ſhould not Account for that Money. V. March. 44, 55. 1 Cro. 87. 1. Ro. 1. 346.

Truſt, and afterwards married with Sr. *John St. John*, and afterwards ſhe received the Moneys, which came of the

(6) Pincombe *verſus* Rudge.

Covenant.

Devon.

Hill. 5. Jac. Rot. 941. Ban. Regis & Excheq. Cham. Mich. 11. Jac.

" AMy Pincombe and others Plaintiffs brought an Action of Cove- " nant againſt John Rudge, and declared, that Rudge the Defendant " by his Indenture dated 30 Octobris 32 Eliz. did demiſe unto them all his " Lands in South Molton, in the Tenure of J. S. by theſe Words, Dedit, con- " ceſſit, demiſit & confirmavit unto the ſaid Plaintiffs Habend. & Tenend. for " their Lives, rendring Thirty Pounds a Year Rent, with this expreſs " Clauſe of warranty following, And the ſaid John Rudge, and his Heirs, " all the ſaid Premiſes unto the ſaid Amy, &c. againſt all Perſons claim- " ing by, from or under the ſaid John, his Anceſtors, or Heirs, ſhall and " will warrant, acquit and defend, during the Term aforeſaid. This " was a grant of the Reverſion upon an Eſtate for Life, made to one John " Pincombe and others, in the 15th of the Queen, by the ſame John Rudge, " who did atturn to the Grant to Amy and others. And the ſame John " Rudge, in the 30th Year of the Queen, had demiſed the Premiſſes unto " one William Hunt for term of Years, to begin after the Death of the " ſaid John Pincombe and others. After all this, John Pincombe the laſt " Tenant for Life died: Amy Pincombe, and the other Grantees of the

Action of Covenant upon a warrantry real. 1 Rol. Rep. 25. Jenk Cent. 291. Yel. 139. Noy. 131. 1 Roll. 353. Apr. 28. Ro. 1. 519. Co. L. 378. b. 389. B. Condition 141. Br. Covent. 25.

" Reverſion entred, upon whom William Hunt the Leſſee entred, whereupon " they brought their Action of Covenant againſt John Rudge, and laid their " Damage to two Hundred Pounds; whereupon the Defendant pleaded in " Barr, that the Plaintiff had formerly brought a Warrantia Chartæ againſt " him upon the warranty aforeſaid for the ſame Lands, and yet it was that " hanging, and undetermined; whereupon the Plaintiff demurred in Law, " and Judgment given for him, and Damages and Coſts Twenty eight " Pounds ſix Shillings eight Pence; whereupon Rudge brought a Writ of " Error in the Exchequer Chamber, and the only Queſtion was, whether upon this Clauſe of Warranty real annexed unto a Freehold, an Action of Covenant to recover Damages could be grounded. And it was agreed by all the Judges in the Exchequer Chamber, that this Action of Covenant will lie; becauſe, that though the Warranty was annexed to a Freehold, yet the Breach and Impeaching was not of a Freehold, but of a Chattel (that is to ſay) of a Leaſe for Years, for which there could neither be a Voucher, Rebutter, nor Warrantia Chartæ, ſo that though there had been a Judgment in the Warrantia Chartæ in this Caſe, yet neither upon Entry, nor upon Recovery in Ejectm' firmæ upon this Leaſe, there could be neither Voucher, nor Rebutter, nor Value upon the Warrantia Chartæ; and therefore a real Warranty is a Covenant Real, when the Freehold is brought in Queſtion. But when a Leaſe is in Queſtion, or any other Loſs, that doth not draw away the Freehold, it may be uſed as a Perſonal Covenant, whereupon Damages may be recovered, ſo it is both a real and perſonal Covenant to ſeveral Ends and Reſpects. And ſo it was adjudged for the Defendant upon the Writ of Error. But another Error was aſſigned, that there was no Averment that there were any Lands in S. in the Tenure of J. S. It was anſwered, that it appeared ſufficiently that there were ſome: And that the Declaration ſaid that he did Demiſe, and that the Tenant for Life was ſeized, and that Hunt entred; and ſo of the other Entries. By all which it appears that there was ſome Land: And if there were any Land it is well enough, though it be not certain what, or how much, becauſe there was no Land to be recovered, but Damages only; and the Aſſeſſing of Damages proves alſo that there were ſome Lands.

Error Queſtion. Yel. 139. Co. L. 389. a. Co. 10. 97. b. 48 E. 3. 2. b. p. 4. 6 E. 3. 7. p. 16.

Judgment in Error affirmed, an Error. 2 Cr. 680.

(7) Muſgrave *verſus* Wharton.

Error. Chec. Chamb. Weſtmoreland. Trin. 9. Jac. R. 305. Scire fac. muſt be where the firſt action was laid. V. Cro. 2 part, and Yelv. 218. the ſame Caſe. Jenk. Cent. 291. 2 Cro. 331, 353. Yelv. 21. 1 Cr. 313. 20 H. 7. 3. B. lieu 88. Dy. 295. b. Plo. 2667. 5 Co. 58. b. Ap. 196. Heth. 20, 24. Cro. Jac. 484. Cro. Car. 34. 1 Cr. 22.

EDward Muſgrave had Judgment againſt Thomas Wharton, Adminiſtrator of Edward Muſgrave, upon an Obligation of two Hundred Pounds, and the Action was laid in the County of Cumberland. Afterwards the Plaintiff upon the ſame Judgment brought a Scire Facias in Weſtmoreland, and had Judgment upon two Nihils. And now, upon a Writ of Error that Judgment was reverſed in the Exchequer Chamber, for a Scire Facias muſt be brought in the ſame County, where the firſt Action was laid.

Lane *verſus* Mallory.

Aſſumpſit. Chec. Camb. London. Jenk. Cent. 292. 3 Cr. 821. 1 Roll. 20. 1 Roll. Rep. 26, 27. 2 Cro. 342. Paſch. 11. Jac. Rot. 525. Conſideration where one takes Loſs.

" RObert Lane brought an Aſſumpſit againſt Henry Mallory, and ſhews " That William Mallory, Father of the ſaid Henry deceaſed, was in" debted unto the Plaintiff in two Hundred Pounds; and that Sir John " Wentworth, and Sir Thomas Mildmay were bound unto the ſaid William " Mallory by two ſeveral Statute-ſtaples in two Hundred Pounds. And " that the ſaid William Mallory did deliver thoſe Statutes unto the ſaid " Plaintiff, to the intent that he might be ſatisfied of the ſaid two Hundred " Pounds due unto him by the ſaid Mallory, by Force whereof he was poſ" ſeſſed of the ſaid Statute. And the Defendant Henry Mallory pretending " himſelf to be Executor to William the Father, in Conſideration that the " Plaintiff at the ſpecial Inſtance of the Defendant would deliver unto " him the ſaid Statutes, he did promiſe to pay unto him Fifty Pounds " at one Day, and Fifty at another and avers that he delivered the Sta" tute, and the Defendant paid him Forty Pounds of the firſt Fifty Pounds, " and the reſt he hath not paid." Upon Iſſue Non Aſſumpſit, it was found for the Plaintiff, (Damages were one Hundred Eighty Pounds) who

who had Judgment in the King's Bench: And now a Writ of Error being brought into the Exchequer Chamber, the Judgment was affirmed, for though it doth not appear that the Defendant was but pretended only to be Executor, and ſo could make no Profit of the Seate, yet becauſe they were delivered to the Plaintiff, with Intent to procure him Satisfaction, ſo as he might cancel them, or take Compoſition for them, and that at the Inſtance of the Defendant, and in Hope of his Promiſe, he did deliver them out, and deprive himſelf of that Means, it is a ſufficient Conſideration.

9 Co. 94. a. Plo. 305. b. Co. 5. 89. b. Co. L. 232. a ap. 253. Yel. 68. Co. 6. 45. 2 Cr. 342. Noy 81 Sid. 32.

(9) Gardiner *verſus* Bellingham.

" Richard Gardiner brought an Aſſumpſit againſt Thomas Bellingham, and " declared that the Defendant in Conſideration that he was indebted " unto the Plaintiff in ten Pounds four Shillings ten Pence, for Agiſtment " and Feeding of certain Beaſts of his in the Plaintiffs Ground, and for " Wheat, & aliis mercimoniis per prædict. R. habitis & receptis, did aſſume to pay " to the Plaintiff the ſaid Debt, that he hath not paid it. Upon Iſſue non " aſſumpſit, it was found for the Plaintiff, and ſeventeen Pounds five Shil- " lings four Pence Damages and Coſts, and Judgment given accordingly " upon this Writ of Error was brought into the Exchequer Chamber: The " Error aſſigned was, that there muſt be ſome certain Cauſe of the Debt " aſſigned: For it is no ſufficient Declaration to ſay where the Defendant " was indebted to the Plaintiff in ten Pounds, and promiſed to pay it: But yet the Judgment was affirmed, for though it be not ſufficient to ſay generally that he was indebted, becauſe that may be for Rents upon Leaſes, or Debts upon Specialties, yet this is certain enough, for as well the Wares and Merchandizes, as the Paſturing and Wheat, are perſonal Things, for which an Aſſumpſit may lie, and may be turned into Damages, and it requires not ſo much certainty, as if it were an Action of Debt upon the very Contract.

Jenk. Cent. 293. Ro. 1. R. 24. Co. 10, 77. a. 3 Cr. 100. ap. 18. 216. 21 H. 7. 13. 1 H. 7. 1. 5 H. 11. Cr. Car. 631. Aſſumpſit. *Surrey.* Trin. 10 Ja. R. 492. B. le Roy Excheq. Cham. prædict. Thomam de In aſſumpſit for Debt, what certainty is requiſite. 2 Cro. 245, 207, 397. 213, 598, 668. Allen 20. 214. Yelv. 175. 2 Cro. 672. ap. 18. B. action ſur le Caſe 108. Cro. Car. 32. 6. 2 Cro. 77, 207, 213, 598, 548. ap. 88, 284. Yel. 1, 9, 17, 18, 20, 84. 1 Cro. 343, Co. 494. a. Saund. 71. 2 Saund. 122.

(10) Wilkes *verſus* Jorden.

Ejectione.

" Thomas Wilkes brought an Ejectione firme againſt Rowland Jorden, upon " a Demiſe made of certain Land, in Wharton Aſton by Edw. Bridge- " man, upon Iſſue not guilty, it was found for the Plaintiff, and Judg- " ment given that he ſhould recover the Poſſeſſion of his Term, and eighteen " Pounds Damages and Coſts. Hereupon Error aſſigned was, that Ed- " ward Bridgman was ſeized but in the Right of Elizabeth his Wife, and that he was dead before the Day of the Judgment; and ſo the Leaſe determined. And therefore Judgment to recover the Term erroneous; it was over-ruled and Judgment affirmed, for though it were agreed, that in the Exchequer Judgment may be reverſed for Errors in Fact, as Death of the Parties, or the like, where the Writ is abſolutely abated: There is no Colour in this Caſe, where the Error depends upon the Death of one, that is not Party to the Suit, and upon the Title of the Land, for the Defendant may ſay that Bridgeman was ſeized in his own Right, or the like, which were to re-examine the whole Title in the Writ of Error.

Jenk. Cent. 293. 2 Cr. 332. 1 Rol. 768. B. error 117. Pop. 132. N. B. 20. e. *Salop* Ba. R. Exchequer Chamb. P. 9. Jac. Rot. 101. Error by the death of one not party to the Writ. Error in fact out of the Kings Bench.

2 Cro. 5. 1 Cro. 514. 2 Cro. 657. p. 166. 35 Cr. 713. Jones 4. 1 Yel. 208.

(11) Crow *verſus* Edwards.

Debt.

" Robert Crow brought an Action of Debt upon an Obligation of forty " Pounds againſt William Edwards, for the Payment of thirty one " Pounds ten Shillings at Coventry, Iſſue taken that the Money was paid " at Coventry, and yet by Conſent of Parties, and Paper Rule of Court, " the Iſſue was tried at London, and found for the Plaintiff, and Judgment " given; and upon Judgment a Writ of Error brought in the Exchequer Chamber, and the Judgment reverſed; for Conſent of Parties may not change the Law. 5 Co. 36. b. & 40. b. ultra.

Ro. 1. Rep. 28. Ro. 1 Abr. 787. Jenk. Cent. 310. 1 Bulſt. 216. Yel. 218. Co. 6. 47. a. Co. 8, 163. a. *London* B. le Roy. Exch. Cham. Paſch. 7 Jac. Rot. 47. Wrong viſne by Conſent. Dyer 367. ultra. Viſne from Town, or Pariſh in the Record.

V. Cook. 5. part. Tr. 38 Eliz. in Exchequer 1 Inſt 125. b. ultra. 1 Inſt. 51. b. *Baynham's* Caſe. 7. H. 6. 7. Tryal of Villinage altered from natural Trial by Conſent of the Parties. 44 E. 3. 3. The Demandants and Tenants Conſent, that two of the Knights in a Writ of Right ſhall be Etquires, although by the Law they ought to be Knights, yet it is good though againſt the Law, being by Conſent of the Parties. Co Lit. 125. b. 309. a. 2 Cro. 664. viſne B. 15. 1 Bulſt. 216. Damages B. 28. 2 Keb. 260. p. 9.

Miles

Caſe. (12) Miles *verſus* Jacob.

B. le Roy Exchequer Cha. *Innuendo.* Thou haſt poiſoned *Smith.* Poſt. 268. 89. 1 Roll. 77, 83, 775. Co. Ent. 25. b. nu. 23. Allen 75. Jenk. Cent. 293. Ro. 1. R. 24. Cr. Jac. 424. 3 Cr. 282. 2 Cro. 343, 215. Meſme 1 Roll. R. F. 24. Damages ſeveral, and coſts intire. 1 Cr. 339. 10. Co. 117. 13 Co. 71. 2 Cr. 306. 4 Co. 16. 3 Cro. 537. 2 Cr. 424. 4 Co. 14. b. 10 Co. 131. a Ap. 268. 5 Co. 35. b Yelv. 21. ultra. 9 H. 7. 4, 5. 2 Cro. 438. ultra. 2 Sand. 171. Plo. 91. b Coſts intire though part of the Action fail

" EDward Miles brought an Action of the Caſe againſt Francis Jacob for " theſe Words, Thou Innuendo, &c. haſt poiſoned Smith quendam Sam. " Smith adtunc defunct. innuendo. And it ſhall coſt me a Hundred Pounds " but I will Hang thee for it." And further declared that the Defendant of meer Malice, at the next Aſſizes and Gaol-delivery holden at Bury, procured him to be falſly indicted, that he had given poiſoned Drink to Smith, to the intent to poiſon him, whereof he died. Whereupon Miles was afterwards acquitted. Upon Iſſue not guilty it was found for the Plaintiff, and Damages ſeverally for the Words and Indiament ſeven Pounds a piece, and Fourteen Pounds Coſts entire; whereupon Miles had Judgment to recover the ſaid Damages and Coſts. And upon Writ of Error in the Exchequer Chamber it was adjudged that the Words could bear no Action for divers Reaſons. For it doth not appear by the Words that he poiſoned him willingly, neither that Smith was dead at the time of the Words ſpoken, and the Innuendo for that Purpoſe is no ſufficient Averment, but for the Indiament, it is adjudged that the Action will lie, ſo that for the Damages, for the Words being ſeveral, the Judgment being reverſed for that part failed. But the Judgment for the Indiament together with the Damages was affirmed alſo for all the Coſts, becauſe there was juſt Cauſe of Suit, which warranted the Coſts, though part of the Suit was without Cauſe.

Treſpaſs. (13) Brock *verſus* Spencer.

Southampton. B. le Roy & L. Ex. Ch. Jenk. Cent. 294, 309. Ro. 1. R. 27. Ro. 2. 620. Ap. 16. Hill. 8. Jac. Rot. 538. Viſne, whether from the Town or Pariſh. Ap. t, 11. Bulſ. 2. 208. Ro. 1. R. 21. Mo. 709. Syd. 10. Yel. 26, 27, 77. 2 Le. 187. 2 Cro. 263, 340. Co. L. 125. t 2 Cro. 680. Styl. 92. Co. 11. 25. b Co. 6. 14. a. Co. 5. 36. b. 2 Cro. 241, 676. Ap. 64. 1 Syd. 10.

" WIlliam Brock brought an Action of Treſpaſs againſt John Spencer, for " cutting down of certain Oaks, carrying away of Timber and Wood " at Hurſley. And in the new Aſſignment lays it in a Cloſe called Newlands, " in Hurſley aforeſaid. To this the Defendant pleadeth that Newlands " was cuſtomary Lands of the Manor of Marden, in the Pariſh of Hurſley " aforeſaid. And that there is a Cuſtom within the ſaid Manor of Marden, " that the Copyhold Tenants of the ſame Tenement might fell Timber, &c. " And the Plaintiff traverſed the Cuſtom, and it was found for him Da- " mages and Coſts Eleven Pounds, in the Kings Bench. Then died Brock " the Plaintiff, and Spencer brought a Writ of Error againſt Sir Thomas " Savage, and others his Executors, and one Error aſſigned was, that the " Venire fac. for Trial of the Cuſtom was, de vicineto de Hurſley, and not " de vicineto Parochiæ de Hurſley." But all the Judges in the Exchequer Chamber overruled it to be good enough, for ſince it was firſt laid that the Treſpaſs was done at Hurſley, which ſhall be underſtood a Town, and then the Defendant ſpeaks of the Pariſh of Hurſley aforeſaid, they ſhall be underſtood all one, and two former Judgments were cited according, for the Word [aforeſaid] couples them.

Error. (14) Walſh *verſus* Wray.

Hill. 9 Jac. Cornub. B. le Roy. Et Exch. Ch. Hill. 9. Jac. Rot. 691. Viſne, whether from Town or Pariſh. 1 Cr. 151. Yel. 27. 2 Cro. 263.

" AND the very like was adjudged at the ſame time in the Exchequer " Chamber, between Alice Walſh plaintiff, and William Ray Baronet " Defendant, in a Writ of Error, in an Action for grinding of Corn at other " Mills contrary to thy Cuſtom, and the difference was, that in the Pleas " there was mention of Liskarred, and the Pariſh of Liskarred aforeſaid, and " the Venire fac. was de vicineto of Liskarred, and judged good enough for " the Reaſon aforeſaid.

Nota: That both the Town and Pariſh are upon Record. I hold that it would be a Fault to take the Viſne from the other, for it hath no Warrant from the Record.

Spend-

(15) Spendlowes *verſus* Burket. Treſpaſs.

" JOhn Spendlowes brought an Action of Treſpaſs againſt Richard Burket for breaking of his Cloſe, and taking away Twenty four Lambs, and certain Cartloads of Hay, Rye, Barley, Oats, Peaſe and Wheat, and certain Stones of Wooll. In pleading upon Demurrer the Caſe was thus, Robert Creſſey being Prebend of the Prebendary of Palderton and Farrington, in the Church of the bleſſed Virgin Mary of Lincoln, was ſeized of the Rectory of Palderton, with the Apurtenances in his Demeſne as of Fee, in the Right of his ſaid Prebendary, and ſo ſeized the Twentieth Day of February, 13 Eliz. did demiſe the ſame Rectory by Indenture unto Sir Jarvaſe Clifton Knight, and George Clifton Eſquire, for Seventy Years; then Thomas Biſhop of Lincoln, who was Patron of the ſaid Prebend, and Ordinary in the ſame Dioceſs, granted the next Avoidance of the ſaid Prebend unto one Humphrey Toy, 5 April, Anno 15[illegible], which Grant was confirmed by John Whitgift Dean and Chapter of the ſaid Cathedral Church of the bleſſed Virgin Mary of Lincoln, the third Day of Auguſt, 1572. After which, the ſame Thomas Biſhop of Lincoln, 20 die Julii Anno Reg. Eliz. 16. did confirm the Leaſe made by Creſſey unto Sir Jarvaſe, and George Clifton, and the Dean and Chapter did likewiſe confirm it the 18th Day of September in the ſame 16th Year; the ſame Robert Creſſey being ſtill Prebend, and alive. Then died Creſſey the Prebendary in the 24th Year of the Queen, and the next Avoidance being brought down unto one Thomas Fiſher and Ralph Bowyer Eſq. they preſented unto the ſame Prebendary, John Prat Clerk, who was admitted, inſtituted, inſtalled and inducted into the ſame. And after that the ſame Prat entred into the ſame Rectory, and was thereforе ſeized in his Demeſne as of Fee in the Right of the ſaid Prebendary. Then died Thomas Biſhop of Lincoln, and William Chatterton ſucceeded him; then died Prat the Prebend the 7th of September, 1607. After whoſe Death Chatterton the Biſhop did collate the ſame Prebendary unto one Thomas Burton Clerk, whom he cauſed to be inſtituted and inducted into the ſaid Prebendary, who entred into the ſaid Parſonage, and leaſed the ſame Jan. An. Reg. Jac. 8. unto one Anthony Ward for five Years, from the Feaſt of Saint Martin then paſt. And then this Leaſe was conveyed unto Spendlowes, who entred; upon whom Burket, as Servant unto Henry Carvil, who claimed under the Leaſe made by Creſſey unto the Cliftons, entred upon a Cloſe being glebe, and took the Lambs and Corn being Tithes of the Parſonage of Palderton aforeſaid; whereupon Spendlowes brought his Action of Treſpaſs.

Nor. 1 Ro. 361. Trin. 11. Jac. Rot. 3461.

Leaſe by a Prebend is totally defeated by his Succeſſor.

P. 12. Jac.

And now it was adjudged Paſch. 12. of the King, that the Plaintiff ſhould recover; for though the Leaſe made by Creſſey, for Seventy Years, was not yet expired in Time, and though Burton the Prebend came in after, and under the Confirmation of the Leaſe; yet Prat, the Prebend before him, came in by the Grant of the next Avoidance by a Grant made, confirmed and perfected before the Confirmation of the Leaſe, and ſo conſequently was not ſubject unto it; and then, when he entred upon the Parſonage, he was ſeized in his Demeſne as of Fee, and ſo did defeat the Leaſe totally, ſo as it could never Revive or take Place againſt any Succeſſor whatſoever, upon which Reaſon there is a large Diſcourſe in the Earl of Bedford's Caſe, Co. l. 7. fo. 8. And though Littleton ſeems to be of Opinion, that the Parſon hath not the Right of Fee-ſimple, he doth expound himſelf, as to the Bringing in of the Writ of Right; but otherwiſe the Act of the Parſon is it, which Charges or Gives. And it ſufficeth that the Patron, or Ordinary, do either License or Aſſent. And therefore 6 E. 6. Dyer 69. If a Parſon make a Leaſe, or charge his Glebe to begin after his Death, and the Patron and Ordinary confirm it in his Life, this ſhall bind his Succeſſors.

Dy. 72. b. 133. 1.

1 Ro. 480. p. 5. Ro. 1. R. 361. 1. Cro. 582 Co. Lit. 46 a. 1. Moor 481. Dyer 62. pl. 5. Jones 454. Mo. 66. Co. L. 296. x

Co. lib. 7. fol. 8. Plo. 449. b. 1 Inſt. 341. b.

Co. Lit. 309. b. 1 Ro. R. 442.

Baker

Debt. (16) Baker *verſus* Spain.

Banc. Com. Pleas Hill. 11. Jac. Rot. 3139. Entre congeable B. 2. Brnl. 1. 76. Pinch Entr. 283, 289. Godb. 95. 11 E. 4. 10. p. 5. Doubl. Br. 101. Ro. 1. Ab. 470. Co. L. 201. b Rent pleaded behind upon Bond, in needs not to alledge demand expreſly. Hutt. 91. 1 Cro. 76. Apr. 326, 207, 82. Godb. 108.

WIlliam Baker brought an Action of Debt upon an Obligation of Fifty Pound againſt Simon Spain. The Condition was, that this Defendant ſhould obſerve, perform, fulfill, pay, and keep all and ſingular the Covenants, Grants, Payments and Conditions expreſſed and contained in one pair of Indentures bearing Date, &c. The Defendant pleads the Indenture, being an Indenture of Leaſe, and pleads generally the Performance of all Covenants, &c. The Plaintiff aſſigns the Breach for Non-payment of a half Year's Rent, being Thirteen Pound Ten Shillings, at our Lady Day 9 Jac. The Defendant rejoyns, that the Plaintiff entred into the Lands demiſed, before the ſaid Feaſt ſc. 24 die Martii, Anno Regis 9. Whereupon Iſſue was taken, and it was ſaid in Arreſt of Judgment for the Defendant, that there was no Breach laid, becauſe there was no Demand of the Rent alleadged. And the reſt of the Judges ſaid that it was no fault, becauſe the Iſſue did not ariſe upon the Rent not paid, but upon a Collateral Point, that did admit the Rent not paid, becauſe by the Entry it was made not payable. But I held, that in this Place the Breach was plainly made in the Replication, when the Plaintiff ſaid that the Rent was behind, which implies, that it was demanded and not paid, for in ſuch Caſe the Plaintiff never pleads that he did demand it, and it was behind. But if it were not indeed demanded, then after the Plaintiff had pleaded the Rent behind, which is true prima facie, then the Defendant rejoins, that he was there ready to pay it, and no Man did demand it, and ſo the Demand comes in Iſſue, and ſo Judgment was given for the Plaintiff. And in this Caſe Juſtice Warberton ſaid, that it was reſolved in a former Caſe in this Court, that, where a Rent was reſerved upon a Leaſe, the Leſſee bound by Obligation to pay it, that now the Leſſee muſt pay it without Demand; but he is not bound to ſeek the Leſſor, but to tender it only upon the Land, for he hath bound himſelf to pay it, but ſtill as a Rent, and where the Law will.

It is otherwiſe in juſtifying of Entries for non-payment of Rent. 1 Le. 17. p. 28. Yel. 66.

Judgment. Bond to pay Rent, it muſt be tendred, but upon the Land, as Rent And ſo it was reſolved Paſc. 26. Eliz. in Co. B. in *Buſhy* Vicar of *Pancraſs* Caſe, that if the Leſſee covenant to pay all the Rents reſerved in the Indenture of Leaſe; or be bound to pay them; he muſt pay them without Demand, at the Place limited for the payment thereof. Jones 10. p. 9. 2 Cr. 500. 193. 2 Ro. 443, 460, 761. Noy. 16. Mo. 636. 3 Cr. 829. p. 33. 2 Le. 150. 2 Brnl. 767. Co. 2. 3. b. Pl. 70. a. 1 Cr. 76. Hutt. 114. 90, 91.

Partition. Incerti nominis. Cr. Car. 76, 77. 2 Cr. 500. Ro. 1. 443. Eſſoines in Writs of Partition ſeveral Weſt. 1. c. 43. Hutt. 43. Brnl. 1. 152.

(17) Caſe of Eſſoines.

A Writ of Partition was brought againſt three, whereof one was eſſoined, and the other two likewiſe would caſt ſeveral Eſſoines; the Demandant's Counſel ſaid, that they could not have ſeveral Eſſoines, becauſe that the Statute of Weſtm. 1 cap. 43. hath provided, that many Tenants ſhould have but one Eſſoine, as if they were but one Tenant: Whereupon I looked on the Statute in Court, and ſaid that I was of Opinion, that that Statute was not to be underſtood of a Writ of Partition, where nothing is in Queſtion but the Diviſion of the Land, but where the Right of the Land was in Queſtion. And that the Words of the Statute did import ſo much, which provides againſt the Delay of Right by ſeveral Eſſoines. And the Prothonotaries being asked ſaid, That their Preſidents were ſo that they might ſever in Eſſoines in a Writ of Partition, and that after Appearance: And after Trinity Term 12 Jac. Motion was made, that two being vouched in the Formedon in Reverter brought by the Earl of Clanrickard and his Lady, againſt the Lord Liſle before an Appearance, one of the Vouchees caſt an Eſſoin, and it was accepted unto upon the ſaid Statute. But it was reſolved, that the Statute was to be expounded of Eſſoines caſt by Jointenants after Appearance, for till then it could not appear whether they were Tenants or no which are the Words of the Statute, and the Statute of Glouc. cap. 10. recites that the Statute is expreſly of Eſſoines after Appearance.

Eſſoines ſeveral for Vouchees. 38 E. 3. 18. Ro. 1. 825. Dent. 1. Ap. 46, 273, 329.

Caſe. *Mid.* Mich. 11 Jac. Rot. 1252. in Com. Banco. 2 Init. 251. Denant. 3. Brownl. 1. R. 6. Yel. 32. 1 Roll. Abr. f. 53, 54. Poſt. 268, 45, 117. Moor 855.

(18) Yardly *verſus* Ellill.

YArdly an Attorney of the Common Pleas, brought an Action of the Caſe againſt Ellill, and ſaid, That whereas he had been, and yet was an Attorney, the Defendant had Speech concerning him with one Bancroft, with

" with whom he was before retained for his Attorney, and ſaid unto the " ſaid Bancroft, Your Attorney (meaning the ſaid Yardley) is a bribing " Knave, and hath taken Twenty Pounds of you (meaning the ſaid Bancroft) " to coſen me (meaning the ſaid Ellill) upon Iſſue not guilty, it was found " for the Plaintiff." And now it was ſpoken in Arreſt of Judgment, two or three ſeveral Times by Serjeant Hutton: It was ſaid that theſe Words were ſpoken adjectively, that the Word [bribing] might be underſtood doubtfully, either by giving or taking Bribes. Again, that the ſecond Clauſe ſhould be taken as a Declaration of the former General, and therefore if they alone would not bear Action, they would extenuate the former Words, like to the common Caſes. Thou art a Thief, for thou haſt ſtoln my Apples out of my Orchard, and thou haſt ſtoln, &c. as it is here; for the Senſe is all one: And there it was ſaid, that an Attorney could not take a Bribe, for he is no Judge; at leaſt he could not take a Bribe of his own Client. And of that Opinion was Juſtice Warberton: And Juſtice Winch ſaid, that the laſt Words were not ſufficient of themſelves, becauſe it was not ſaid that the Bribe was taken for any Cauſe depending. But Juſtice Nichols and I were of Opinion, that the Action would lie, and that the general Words [bribing Knave] were ſufficient of themſelves; for the Word [bribing] is a Word of certain Signification, and doth import a common Practice in him, whereof he may take a Denomination. And whether he give, or take a Bribe, they are both Unlawful againſt his Oath; for he oweth to his Client Fidelity, Secrecy, Diligence, and Skill; but he oweth him not any diſhoneſt or undue Practice: For by this general Obligation to Juſtice, and the Court where he ſerveth, he is forbidden to do any thing to pervert Juſtice, as appeareth by his Oath: And Juſtice Warberton ſaid, that theſe general Words alone would have born an Action; and Juſtice Winch ſeemed not to deny it. Then to the ſpecial, we two were alſo of Opinion, that they did aggravate, and make them good in Particular. And I ſaid, that an Attorney may be ſaid to receive a Bribe, for whoſoever hath ordinary Intermedling in Caſe of Juſtice, be he either Judge, Officer, or Attorney, if he receive an undue Reward for any thing againſt Juſtice, that is a Bribe. Again, an Attorney may receive a Bribe of his own Client, when the Reward exceeds Meaſure, and the end of the Cauſe of Reward is againſt Juſtice, as if he will take a Reward to raze a Record, or cauſe an Attorney to appear on the other Side and confeſs the Action, or the like; both which Points are full in this Caſe, that he received Twenty Pounds for a Bribe to coſen the Defendant: And I inſiſted much upon Burchley's Caſe, where the Words were, that Burchley being an Attorney was a corrupt Man, and dealt Corruptly; which Words are ſo general, and do not pitch upon any certain kind of Corruption, as theſe do, Only they were inforced in the Declaration, that there was former Speech of Burchley's dealing as an Attorney: And Juſtice Warberton, after I had ſpoken, ſaid, that he began to ſtagger in his Opinion. And after, Tr. 12 Jac. Judgment was given for the Plaintiff.

2 Cro. 566. Action ſur le caſe, an Attorney a bribing Knave.

Poſt. 77, 331. Cr. Jac. 66, 114. Ro. 1. 51. 2 Cr. 154, 231. Pop. 139.

11 H. 6. 18. a. l'oath Dee Attorney.

Burchley's Caſe. 4 Co. 16. 6. Yel. 142, 143.

Judgment.

(19) Peaſe *and* Stileman, Executors *of* Elizabeth Hanchet, *againſt* Mead.

Debr. Quer. ter. Executor cannot claim Money appointed to an actual Aſſignee. 1 Ro. 915, 916, 421. Winch Ent. 228. Godb. 192. Brownl. 1 R. 77. Yel. 9. 85. Br. condition 5. Mo. 855. 5 Co. 97. a. Co. L. 210. a. 1 Le. 316, 443, 2. and 93. Dy. 181. p. 50. Expoſition, Br. 4. Plo. 287. b. 288. a. Deputy Br. 1. 2 part Chau. caſes, 270. Placito 118. Dr. Lake's caſe agree côme icy. Terms de la ley, verb. Aſſignee, Com. 286. 3 Le. 212. p. 278.

" PEaſe and Stileman, Executors unto Elizabeth Hanchet, brought an Action " of Debt againſt Mead, upon an Obligation of Thirty Pounds: The " Condition was, that Mead ſhould pay Twenty Pounds to ſuch Perſon or " Perſons, as the ſaid Elizabeth Hanchet ſhould, by her laſt Will and Te" ſtament in Writing, name and appoint the ſame to be paid. The De" fendant ſaith, that ſhe did appoint no Perſon, to whom the ſame ſhould " be paid." The Plaintiffs reply'd, that ſhe made her Will in Writing, and thereby made them her Executors; whereupon the Defendant demurred in Law, and the Opinion of the Court was clear, that the Money is not payable unto the Executors; for though, where any thing Teſtamentary is covenanted to be done unto a Man or his Aſſigns, that is to be

done to the Executors, where there is no actual Aſſignee, as in Chapman and Dalton's Caſe: And in 27 H. 8. for the delivering of Rentals to a Man and his Aſſigns, the Reaſon is, becauſe the Word [Aſſignee] is indifferent both to the Aſſignee in Deed, and in Law. And there, when the Executor takes it, he hath it to the Uſe of the Teſtator. But here the Words muſt needs be underſtood of an Aſſignee indeed, who ſhall take it to his own uſe, for the Word [Paying] carrieth Property with it.

1 Co. 98 b. Pl. 288.

(20) Fryer *verſus* Gildridge.

Debt. Hill. 11 Jac. Rot. 1990. Brownlow. One Perſon is Executor both to Obligor and Obligee. 1 Brnl. 76. 1 Ro. 940. Meſme ca. Mo. 855. Apr. 127. Jones 345. Co. 8. Rep. *Needham*'s Ca. 136. 1 Syd. 76, 79. Bro. Ent. 112. Hutt. 128. Dy. 140. a. 186. a. 184. b. Plo. 36. a. Cro. 373, 551. Co. L. 264. b. 20 E. 4. 17. 3 Cr. 114. Hut. 94. Judgment.

"FRyer brought an Action of Debt againſt Gildridge upon an Obligation, and the Caſe fell out to be thus. Two were bound to a third jointly and ſeverally. The Obligee made the Wife of one of the Obligors his Executrix, and dy'd. The Woman Executrix Adminiſtred; then the Husband, the Obligor, made her his Executrix and dy'd, leaving Aſſets to pay the Debt; then ſhe dy'd, and the Plaintiff took Adminiſtration of the Goods and Chattels of the Obligee unadminiſtred, and brought his Action againſt the Defendant, being the ſurviving Obligor." And it was adjudged by all the Court, that the Action would not lie, upon two Reaſons; the Firſt, that when the Obligee made the Wife of one of the Obligors his Executrix, the Action was at leaſt ſuſpended, and the Rule is, that a Perſonal Action once ſuſpended is Extinct: But the other Reaſon is the ſurer, when the Obligor made the Executrix of the Obligee his Executrix, and left Aſſets, the Debt was preſently ſatisfied by way of Retainer, and conſequently no new Action can be had for that Debt.

Yelv. 160. Bone caſe lau Debt n'eſt extinct Plow. 186. 4. 21 E. 43. Br. Extinguiſhment, 81.

(21) Griſley *verſus* Lother.

Aſſumpſit. Hill. 11 Jac. Rot. 1866. Aſſumpſit in conſideration the Mother ſhould conſent to the Marriage of her Daughter. V. More. 857. the ſame Caſe. Note, the Husband being Father, who hath all Power over the Child, and not the Mother legally, was alive at the time of the Promiſe, but yet her Power is alſo great in Nature. 1 Roll. 19. Brownl. 1 R. 18. Mo. 857. Ap. 105, 106. 1 Cr. 408. Allen 78. Hutt. 39, 101. Co. L. 204.

"GRiſley brought an Aſſumpſit againſt Lother, and declared, that where ſhe had a Daughter, which was Heir apparent to her Husband, the Defendants Teſtator, in Conſideration that ſhe, at his ſpecial Inſtance and Requeſt, would give her Conſent that he ſhould have that Daughter to Wife, did Aſſume and Promiſe that he would give her one Hundred Pounds; and then ſaith, that ſhe did give her Conſent, &c. And the Defendant pleaded non Aſſumpſit, it was found againſt him.

"And now it was ſpoken in Arreſt of Judgment, that this was no Conſideration at all, for that there was nothing to be done of the part of the Plaintiff actually, that was unto her either Travel or Charge, but to give a naked Conſent, which was not in Law neceſſary to the Marriage. Neither is the Daughter ſaid to be Heir apparent to the Mother, nor in her power or Guard, by Nurture or otherwiſe: Neither doth it appear that ſhe was any Advancement to the Defendant, for a Woman is acknowledged in Law to be advanced in Marriage alone, but ſo is not the Man, and therefore ſhe hath the Writ Cauſa Matrimonii prælocuti, but ſo hath not the Man." And of this Opinion was Juſtice Winch. But my ſelf, and other two Judges were of the contrary Opinion, for it is apparent, that the Mother hath by the Law of Nature, and in the Affection of the Daughter, and the Confidence ariſing thereof in her Counſel and Direction, a ſpecial ſtroke to incline the Daughters Mind either one Way or other; and the Deſire of her Conſent, and the Working of it, ſhews that ſo the Defendant conceived it, and therefore it ſhall be preſumed of Importance to have her Conſent, which being granted at his Suit and Requeſt, ſhall be accounted Conſideration ſufficient. And ſo it was adjudged for the Plaintiff, Tr. 12. Jac. Jones 365. Plow. 302. a. 3 Cro. 194, 715. Hutt. 85. Mo. 866. 1 Roll. 13. &c.

Judgment. Yelv. 41. 2 Cr. 18.

Libel. Eccl.

(22) Doctor Leiſield *verſus* Tyſdale.

Diſms of the Rent of Houſes by Preſcription. 1 Roll. 642.

"DOctor Leiſield, Parſon of St. Clement's without Temple-Barr, ſued one Tyſdale his Pariſhioner for Tithes of certain Stables, and libelled that of common Right and by Preſcription Time out of Mind the Parſons there uſed to have a modus decimandi for the Houſes, Stables and "Build-

" Buildings, that is to say, after the Rate of the tenth part of the yearly " Rent, or Value of the same. And so he proceeds to demand according- " ly; whereupon a Prohibition was desired, and the Opinion of the Court " was, that a Prohibition was to be granted; for de communi jure, no " Tithes are to be paid for the yearly Rent, or Value of Houses, for " Tithes are paid for the Revenue and Increase of Things; and therefore no Tithes are paid in any such Case in any Cities or Towns in England, saving in London, and this Parish is out of London and the Liberties thereof, Now where there is no Tithe at all de communi jure, there can never be a modus decimandi, for that is with an Abatement, Correction, or Alteration of the Tithe in specie. And yet it seems that this kind of Payment had been long used here about London, which certainly was by Use; for when the Statute gave it in London, the Parts adjoining gained the same by that Colour, and even in London it must be sued for according to the Form prescribed by the Statute. But for Houses Oblations were paid in all Places, and now by the Statute were brought to a Certainty, that is, a Groat for a House.

11 Co. 16. a. N. B. 53 E. Nota, That Modus decimandi can hardly stand to rise and fall according to the Rent by Prescription.

Cr. 1. 596.

And in this Case Justice Warberton said, that it had been lately adjudged in this Court, that a Copyholder could not lay a Custome to fell and sell Timber upon his Copyhold. Winch. 1. Cr. El. 5. Noy. 2. Cr. Car.

2 Cro. 30. Jones 245. Ro. 1. 560. deut. 6. Cr. Car. 221. Cr. Jac. 29. Styles 233.

And in Mich. 12 Jac. the Case was moved again by Harris for the Doctor, who said, that by a special Custom such a Form of Tithing would stand in any Place; and said, that Doctor Grant had a Consultation in this Court upon Argument in the very same Case, for two Shillings in the Pound in St. Martins le Grand, which was not within the Statute, for it is a Liberty exempted from London, and is no Part of London, nor of the Liberties of London: And the Reason was, because it may be supposed that such Form of Tithing was used for the Land it self before it was built upon, and then the building cannot take it away: And therefore it is now directed by the Court, that they shall declare upon the Prohibition, and then proceed to Judgment. Cro. Car. 596.

11 Co. 15. b. 16. a. Latch. 210.

(23) Bridgeman's *Case*.

" PHilip Bridgeman sued one Williams in the Admiralty Court, and the " Case was this; that one Philip Bernard was Owner of a Ship called " the Bonaventure, and sent her into Spain, and made Williams Master of her, " who (as is alledged in the Admiralty Court) did upon the High Sea " borrow of Bridgeman certain Royals of Eight, to the Value of Fifty " Pounds sterling, for Repayment whereof he did impawn the said Ship, " and returning now Home, and the Ship lying in the Thames, Bridgeman " obtained a Warrant from the Admiralty Court, to arrest the same Ship, " and did so, whereupon Bernard came into the Admiralty Court, and " claimed his Property, denying that the said Williams was Owner, or had " any Power to pawn it; yet nevertheless the Court proceeded to Judgment " against the Ship for his Debt:" Whereupon a Prohibition was granted by the Court, whereof the Reasons were, that by the Common Law, by which Properties were to be tried, the Master of the Ship could not impawn the Ship, for no Property general or special, nor such Power is given unto him by the constituting of him Master. Also it was alledged, that the Contract (if any were) was made in Sevil upon the Land; and it was held, that the Admiralty Court could hold no Plea of Things, though done upon Foreign Lands; and it was also said, that it had been often resolved, that if any Obligation were made at Sea, yet it could not be sued in the Admiralty Court, because it is an Obligation, which takes his Course, and binds according to the Common Law. But it was said by the Counsel of Bridgeman, that by the Civil Law the Master of the Ship hath Power to impawn the Ship and Tackle in case of Necessity, and he hath no other Means to provide such Things, as are necessary for her. And I gave Opinion generally upon the whole Case thus; that the Admiralty Court hath no Power over any Cause at Land, for both by the Nature of the Court, and by the Statute, it is only to meddle with Things arising

Mo. 918. 13 R. 2. cap. 5. Cr. Car. 296, 603. Ro. 1. 530. Brnl. 2, 34. Ro. 1. 532. Apr. 78, 79. 2 Sand. 260. Ye. 134, 135. Co. 12. 77, 79, 84. Apr. 196. Co. 10. 116. b. Co. 12. 104. Co. 13. 51. Co. 5. 107. a. Co. 13. 52, 53. 7 Co. 2. a.

12 Co. 103. 2 R. 492, 497, 4. 1 Ro. 133. p. 10. Co. L. 134. Ap. 213.

Admiralty cannot hold Plea for things at Land. 1 Cro. 602. Ap. 79, 113.

upon the High Seas. And further, that theſe Things at the Sea done muſt be alſo of the ſame Nature and Reſpect. And therefore if a Man ſhould make an Obligation at Sea for Security of a Debt growing before at Land, or ſhould make a Promiſe to pay the ſame, this cannot be ſued in the Admiralty Court, becauſe it is not for a Marine Cauſe; as a Court of Piepowder for Market Cauſes. But I was of Opinion clearly, that the Admiral Law is Reaſonable, that if a Ship be at Sea and take Leake, or otherwiſe want Victual, or other Neceſſaries, whereby either her ſelf be in Danger or the Voyage defeated, that in ſuch Caſe of Neceſſity the Maſter may impawn for Money or other Things to relieve ſuch Extremities, by imploying the Money ſo; for he is the Perſon truſted with the Ship and Voyage, and therefore reaſonably may be thought to have that Power given to him implicitly, rather than to ſee the whole Loſt. But in this Caſe the Faults were, that neither the Contract nor the Impawning were ſaid to be for any ſuch Cauſe, neither was the Impawning ſaid to be at Sea, neither was there any Colour that for the general Debt of the Maſter they ſhould proceed againſt the Ship of another Man. And I am of Opinion clearly, that if this Cauſe had been within the Juriſdiction of the Admiralty, that we ſhould not prohibit them, becauſe they gave Sentence againſt our Law in this point of Impawning, for it ſhall be preſumed according to their Law, or elſe an Appeal. Vid. 212, 213.

1 Syd. 112. accord.

Covenant.

(24) Holder *verſus* Taylor.

Paſch. 11. Jac. Rot. 1358. Parol. Demiſe.

HOlder brought an Action of Covenant againſt Taylor, and declared for a Leaſe for Years made by the Defendant by the Word [Demiſi] which imports a Covenant; and then ſhews, that at the time of the Leaſe made, the Leſſor was not ſeiſed of the Land, but a Stranger, and ſo the Covenant in Law broken. But he did not lay any actual Entry by force of his Leaſe, nor any Ejectment of the Stranger, nor any Claiming under him; whereupon it was objected, that no Action of Covenant would lie, becauſe there was no Expulſion. But the whole Court was of Opinion that an Action did lie; for the Breach of the Covenant was, in that the Leſſor had taken upon him to demiſe that, which he could not; for the Word [Demiſi] imports a Power of Letting, as [dedi] a Power of Giving. And it is not Reaſonable to enforce the Leſſee to enter upon the Land, and ſo to commit a Treſpaſs. But if it were an expreſs Covenant for quiet Enjoying, there perhaps it were otherwiſe.

Covenant broken before eviction. Brownl. 1 R. 23. Br. condition 141. 3 Cr. 214. 2 Le. 104. Syd. 429, 430, 466. Mo. 419. 1 Cr. 5. Co. 4. 80. b. 5 Co. 17. a. 9 Co. 60. b. 61. Dy. 328. 1 Roll. 520. 1 Le. 324. Yel. 175. 2 Sand. 178, 180. 2 Cro. 73, 315, 444. Apr. 35.

Obligation. Trin. 12 Jac.

(25) *Sir* Daniel Norton *againſt* Simmes.

Southampt. Paſch. 11 Jac. Rot. 346. Bond by Under Sheriff to the High Sheriff. Godb. 212. 23 H. 8. cap. 10. Winch Ent. 193. Brownl. 1. R. 63, 65. 1 Roll. 417. Br. condition 2. Mo. 856.

" SIr Daniel Norton Knight, late Sheriff of Hampſhire, brought an Action " upon an Obligation of an Hundred Pounds againſt Richard Simmes, " for Performance of Covenants, whereof the Effect was. That whereas " Sir Daniel Norton had made Bryan Chamberlaine his Under Sheriff at his " Will, the ſame Chamberlaine by Indenture did covenant with the She- " riff to diſcharge and ſave him harmleſs of all Eſcapes of Priſoners, " that ſhould be arreſted by him, or any Bailiff or Officers appointed by " him. And another Covenant was, that he ſhould not execute any Ex- " tent, Liberate, Elegit, or any other Execution for any ſum above the ſum " of Twenty Pounds, before he had firſt made known to the ſaid Sheriff " the Nature and Quality of the ſaid Writ; and if any ſuch Execution " were above Twenty Pounds, then he would not execute it without the " ſpecial Warrant of the ſaid Sir Daniel Norton the High Sheriff. And " there were alſo divers other Covenants: And the Defendant pleaded, " that Chamberlain the Under Sheriff had performed all the Covenants; " whereupon the Plaintiff replied, that one White, Anno 44 Eliz. had reco- " vered in the Common Pleas two Hundred and three Pounds Debt againſt " one Fielder, and that he had gotten Fifty two Pounds thereof by an Exe- " cution of Fieri Facias in the ſaid County of Southampton, and died, and " that Frances White, his Executrix, had ſued a Scire Facias againſt the ſaid " Fielder for the Reſidue, ſcilicet One Hundred Fifty one Pounds, and had " Judgment, and took out a Capias ad ſatisfaciendum and delivered it to the " ſaid Chamberlaine, who arreſted him by Force thereof, and ſo he was in " Execution

" Execution, in the Custody of the said Sheriff, for the said Debt, and so " being, and Chamberlain remaining Under-Sheriff, the said Feilder escaped " out of the Custody of the said Sheriff the Debt not satisfied: By Means " whereof the said Sheriff was chargeable to pay the said Debt, and did " pay it unto the said Frances White: And all this was in the Sheriffwick " of the said Sir Daniel Norton, and while the said Chamberlaine was Un- " der-Sheriff, viz. 6 Jac. Reg. Hereupon the Defendant demurred in Law; and in Trin. Term 12 Jac. the whole Court upon publick Argument gave Judgment for the Plaintiff, and in this Case these Points were resolved.

Judgment. Dy. 120. a. Sid. 23. 10 Co. 99. b. Dy. 119. a. Plo. 65. a. 4 Co. 76. b.

First, that this Case was not within the Stat. of 23 H. 6. both because it was not a Bond made by or in the Behalf of a Prisoner, as Beausage his Case is; as also because the Statute is not pleaded being a special Law: And also because it was not directly pleaded that Norton was High-Sheriff, or Chamberlain Under-Sheriff, but only by way of recital in the Indenture, which was pleaded.

Plo. 143. a.

It was also resolved, that the Sheriff might grant his Under-Sheriffwick to hold at his Will only; for it was in his Choice to make or not to make an Under-sheriff, but to exercise it himself. That an Under-sheriff is in effect but the Sheriff's Deputy, and therefore according to the Nature of a Deputation must be removeable as an Attorney is; so as if the Sheriff should make him irrevocable, yet he may revoke him. There is neither Common Law nor Statute Law, that makes him immoveable. He is but in the Nature of a general Bailiff errant to the Sheriff and the whole Shire, as others are over the Hundred: His Oath appointed by the Statute of 27 Eliz. is, that he shall bear himself well, for so long as he shall continue in the Office. It is necessary both for the publick Service, and for the Indemnity of the Sheriff, that he be removeable by the Sheriff.

Co. 9. 49. b. 48. b. 97. a. 98. a.

Co. L. 233. b. 5 E. 4. 3. 11 H. 4. 73.

Dy. 278. b. 275 a. p. 115.

Yet it is true, that Under-Sheriffs have been long in Use, and Experience proves that many Sheriffs cannot well execute it themselves, so this Point was resolved, that he was a perfect Under-Sheriff, and so the Arrest well made by him, and so an Escape upon it.

Next it was resolved, that a Sheriff in making an Under-Sheriff did implicitly give him Power to execute all the ordinary Offices of the Sheriff himself, that might be transferred by the Law: As serving of Process, and Executions, and the like: But he could not deal in a Writ of *Redisseisin*, because in that the Sheriff is a Judge; nor in that Case of the Writ of Waste, where the Sheriff is commanded to go to the Place wasted, because it is personal unto the Sheriff himself; hereof it follows, that if a Sheriff will make an Under-Sheriff, provided that he shall not serve Executions above twenty Pounds, without his special Warrant, this Proviso will be void: For though he may chuse not to make an Under-Sheriff at all, or may make him at his will, and so remove him wholly, yet he cannot leave him an Under-Sheriff and yet abridge his Power, no more than the King may in Case of the Sheriff himself: But it was said here that the Case here was not so, that the Restraint of Executions above twenty Pounds, grew not on the Part of the Sheriff, but on the part of the Under-Sheriff by his Covenant, which might stand for good, notwithstanding the Repugnancy to his Office: As a Feoffee in Fee-simple, may bind himself to the Feoffor not to alien, though the Feoffor cannot restrain him himself by Condition, for the Repugnancy. But the Covenant here was holden void as being against Law and Justice. For since by being made Under-Sheriff, he is liable by Law to execute all Process, he could no more than the Sheriff himself Covenant not to execute Process without anothers special Warrant; for that is to deny or delay Justice: so this being a Covenant against Law, and being in the Negative, needed no Answer at all, as being void and no Covenant in Law. And though it were not void, yet the General Plea of Performance of all Covenants will serve in the Case of a negative Covenant, *Tamen quære de eo.* Q. plead. perform. generalment è Male. 8 Co. 133. b. 16 H. 7. 11. Co. L. 303. b. Cr. Car. 422.

9 E. 4. 31, 32.

6 Co. 12. a.

Apr. 155.

3 Cro. 440. 9 Ro. 1 Abr. 417. 4 Co. 33 a. Noy 51. 3 Cr. 440. Co. 9. 31. b. Under-sheriffs Power not to be restrained.

Dy. 66. b.

Co. L. 206. b.

11 Co. 53. b. 2 Cro. 103. Plo. 64. b. Apr. 155.

3 Cr. 96. 9 Co. 61. Co. 8. 133. b. Plo. 56. a. Co. L. 303. ab. Cr. El. 691, 749. Ayl. 163. Covenants negative void in Law.

V. in Moor, 856. It was further resolved In this Case: 1. When there are in Indentures specially to the Negatives, that he hath not broken them, and to the Affirmatives that he hath performed them. 2. When the Negatives are against Law, and the Affirmative lawful; there he may plead Performance generally, and the Court is to take notice that the Negatives are against Law. 3. When Covenants are void by the Common Law, and others not void, the Obligation stands good for those, that are good, but not for the other. Cr. Jac. 363, 634, 165, 340, 503, 569.

But

11 Co. 27. b. 3 Co. 83. a. Plo. 68. b. Debt 80. Mod. R. 35.

But it was resolved, though this Covenant was void in Law, yet the Bond was good, for the rest of the Covenants agreeable to Law. And Difference was taken between a Bond made void by Statute, and by Common Law, for upon the Statute of 23. H. 6. if a Sheriff will take a Bond for a Point against that Law, and also for a due Debt, the whole Bond is void; for the Letter of the Statute is so, for a Statute is a strict Law; but the Common Law doth divide according to common Reason, and having made that void, that is against Law, lets the rest stand, as is 14 H. 8. fo. 15.

This Covenant is in Effect not to suffer Escapes.

Hereof it followeth, that if the Covenant for Discharge of Escapes *(ut supra)* were good in Law and broken, that then the Plaintiff ought to have Judgment, and it was agreed, that if a Man will take a Bond to be saved harmless of suffering one to have escaped, or for Enlarging of him out of Prison against the Law, that these Bonds are void; And so are the Cases of Dive and Manning in Plo. and the Case of Thower and Whetstone, Mich. 2. and 3 Phil & Mar. Dyer 118. and so is the Case of 2 H. 4. fo. 9. for the Withernam. Hob. 64. b.

10 Co. 100. b. Plo. 64. b. a. Yelv. 197, 67. b. 68. 3 Cro. 190, 200.

Bonds to save harmless of Escapes, difficult. Plo. 123. b.

But this Case is clean otherwise, and was resolved by the whole Court, to be lawful for the Sheriff, to take Bond of his Under-Sheriff, to discharge and save him harmless of Escapes upon Arrests made by himself; for since he transfers his Authority unto him, it is reason he take Security of him, to perform all justly and faithfully to himself and others, and there is nothing done, or intended against Law; For there is no lawful Permission of any to escape, already done or to be done: As in the other Case, where the Fault is committed by the Party, that takes the Bond upon Confidence of that Security; But here the best Performance of the Covenant is, that no Escape be suffered: And the next, that if any be suffered, that then he satisfy the Party as is just, that the Sheriff take no Loss: It was also resolved, that the Sheriff in this Case, was not bound, either to give Notice to the Under-Sheriff of the Escape, or to make Request for Discharge; for the Covenant hath no such Thing, but binds him to discharge at his Peril. And I was of Opinion, that if the Covenant had not been against Law, for the Executions above twenty Pounds, and that the Barr had been insufficient, because it did not plead specially to that negative Covenant, that yet if the Replication were nought and assigned no sufficient Breach, the Plaintiff could not have had Judgment; for though the Action were well brought upon the Obligation alone, yet when it appeareth that the Condition was for Performance of Covenants: Now there can be no Cause of Action without some Covenant broken. And observe well Tilly and Woodlyes Case, 7 E. 4. for this Purpose, that if it doth appear to the Court, that the Plaintiff hath no Cause of Action, he shall never have Judgment, though he had a Verdict for him against one of the Defendants.

Yelv. 168. 2 Cr. 391. 2 H. 4. 9. Co. 5. 24. a. ap. 51. Saund. 117. Not requisite to give Notice, where one is bound to do an Act by Bond.

8 Co. 124. b. 1 Cr. 300. ap. 129, 199. Dyer 76. b. 119. b. 57. a. ap. 199, 128. Yel. 78. 153. Cr. Car. 5. 8 Co. 153. b. 120. b. 3 R. 52 c. 9 R. 110. Cr. Car. 46. p. 199. 2 Cro. 133, 221, 312. 1 Saund. 285. Plo. 66. c. Yelv. 71. post 280, 54. Plo. 86. a. 264. a. ap. 54, 56. 2 Cro. 134. 8 Co. 93. a.

Parliament.

(26) *A Case of Burgesses of Parliament.*

12 Co. 120. 33 H. 8. cap. 27. 2 Ro. 197.

Burgesses of Parliament and Form of electing of them.

" MAny Towns in Ireland were erected into new Boroughs, and Power
" given them to elect, and send Burgesses into the Parliament, all
" in one Form, whereof for Example, For the Town of Dungannon, the Pa-
" tent runs thus, Statuimus, ordinamus & declaramus per præsentes, that the
" Town of Dungannon shall be for ever a Free Borough, and that within
" the said Borough, there shall be a Body Corporate and Politick, con-
" sisting of one Provost, twelve Free Burgesses, and Commonalty, and that
" the Inhabitants shall be a Body Corporate, by the Name of Provost,
" Free Burgesses, and Commonalty of the Borough of Dungannon, and
" may by that Name sue and be sued, purchase, and alien, &c. And
" then followeth this Clause: Et quod ipsi Præfati præposit. & liberi Burgen-
" ses Burgi prædict' & successores sui in perpetuum habeant plenam peteſtatem
" & Authoritatem Eligendi mittendi & returnandi duos discretos & idoneos viros
" ad inserviendum & Attendendum in quolibet Parliamento in dicto regno no-
" stro Hiberniæ in postr. tenend. And so proceeds to give him Power to
" treat and give Voice in Parliament, as other Burgesses of any other

ancient Borough, either in Ireland or England, have used to do, and upon Doubt conceived, whether that Form had sufficiently enabled this, and the rest of the New Boroughs, to send Burgesses, it was referred to all the Judges, and it was resolved by them, all but two, that it was sufficient.

The Objection was, that the Corporation being Provost, Free Burgesses, and Commonalty, this Liberty or Priviledge was neither granted to them, nor passed by the Word of Grant, though indefinite, not saying to whom; for then the Grant must settle in the Body capable of a Grant by Application of Law, though it were not so said direcly.

But it was answered two Ways: first, that the King might by his Letters Patents ordain, that from a Town not Corporate should come Burgesses to be chosen by the Inhabitants; and so is the Case of many Boroughs and Towns in England, that have Burgesses by Prescription. that never were incorporate, and therefore this Liberty could not commence by Grant, bot by Ordinance, as the King may erect a Fair, or a Market, a Warren, Park, Forrest, Chase, Piscary, or the like, by Ordinance, without granting it unto any.

4 Inst. 48. Ro. P. 197. 12 Co. 121.

Dav. 13. a. b. P. Ro. 197.

The other answer was that when there was a Corporation made by the Charter; and by the same an Ordinance that the Provost and Burgesses only should chuse, &c. the Law shall vest this Priviledge in the whole Corporation in point of Interest, though the Execution of it to be committed to some Persons Members of the same Corporation.

4 Co. 77. Jones 262. apr. 211. 2 Inst. 50. 1 Keb. 608. p. 81. 2 Ro. 198.

(27) Hutton's *Case* *Quare Imp.*

Sir Timothy Hutton brought a *Quare Imped.* before the Judges of Lancaster, and the Truth of the Case was thus; that he had presented one Rowth his Clerk to the Bishop of Chester being Ordinary, who refused his "Clerk, and thereupon he complained to the Archbishop of York, who sent "a *Monition* to the Bishop to receive the Clerk within a Time, or else to "appear before him and answer, who did neither: And thereupon the "Archbishop did receive the Clerk, and instituted him; and by his War-"rant he was also induced.

Mo. 861. 2 Ro. 293, 318.
Prohibition lies, if the Ecclesiastical Court will question the Institution after Induction.

"Now the Bishop and one King, a great Scholar presented by the King, "sued in the Delegates, supposing that the Institution by the Archbishop "was void; and by Consequence meant to avoid the Injunction too, as "being without Warrant, whereof the Reason was, because the Arch-"bishop did Institute, &c. here at London, being here in Parliament Time, "and they pretended that these Acts of his being then out of the Dioces "were nullities: Whereupon Serjeant Hutton prayed a Prohibition, and this Court was of Opinion, that this Suit ought to be prohibited, for since by Induction, which is a temporal Act, and triable by temporal Law, the Church is full, it is not to be avoided, but by a Suit of *Quare Imped.* or the like, at the Common Law, and not to be undermined by alledging Insufficiency in the Institution, in the Court Ecclesiastical; for that may come in Question upon the Trial of the Induction at the Common Law, which will not be good, if the Institution were not good, whereupon it was granted. But if this Course might be admitted, they might avoid all Plenarties in the Ecclesiastical Court, or Question them at least, upon Quarrel to the Institution: But it was said to Serjeant Hutton that he could not pray his Prohibition in Respect of his *Quare Imped.* hanging; because of his own shewing the *Quare Imped.* must abate; for the Church is full of his Presentation, but he must make his Surmise, that the Church being full (*ut supra*) that they seek (*ut supra*) without mention of the *Quare Imped.* And though this Advowson and Church were in the County of Lancaster, and the *Quare Imped.* there to be brought, and not here: And there also a Prohibition might be had, yet the Opinion was, that this Prohibition might be granted also in this Court, because the Title of the Advouson is not hereby questioned; but the Intrusion upon the Common Law (whereof this Court hath general Care) is to be restrained; and the Protonotaries said, that they have commonly Prohibitions into Chester upon

1 Cro. 342, 214, 213. Degg. 8, 17.

2 Cr. 335. Co. L. 344. a. 6 Co. 49. a. Cr. Car. 380. Plo. 529. b.

Void.

2 Ro. 317.
Prohibition for cause arising in the Courts of *Lancaster.*

2 Cro. 346. po. 17.

upon it. This Act of Court was complained of to the King, and he ſignified his Pleaſure doth by Sir Thomas Lake, and the Lord Archbiſhop of Canterbury, that he would have a Conſultation granted: But we anſwered his Majeſty by Letter, that we could not do it by the Law, and in the End, after many Paſſages to and fro, it was left, and ſo it ſtood.

1 Cr. 162. apr. 180. Every Eccleſiaſtical Court muſt remit to the next Court. cap. 9.

The Opinion of the Court was, that if a Suit be before an Archdeacon, whereof by the Statute of 23 H. 8. cap. 9. the Ordinary may Licence the Suit to an higher Court; that the Archdeacon cannot in ſuch Caſe baulk his Ordinary, and ſend the Cauſe immediately into the Arches: For he hath no Power to give a Court, but to remit his own Court, and to leave it to the next; for ſince his Power was derived, from the Biſhop, to whom he is ſubordinate, he muſt yeild it to him, of whom he received it; and it was ſaid, that ſo it had been ruled heretofore.

Replevin. (28) Read *verſus* Hawke.

Suff. Mo. 678. 3 Cr. 896. Godb. 186 Brownl. 1. R. 176. Br. Briefe 899, 399. Plo. 340. b. 269. a. 4 H. 6. 9. b. 12 H. 7. 5. Sid. 10, 20. 1 Sid. 9. ac. Pop. 109. Hutt. 10. ante 6. Plo. 298. a. 21. a. 38. b. 337. a. 16 H. 7. 5, 7. Mo. 540. ap. 176. Cr. Jac. 594. Yel. 161. Treſp. B. 3. 205. 9 H. 7. 6. Yelv. 148. ac. 7. H. 4. 27. a. 19 H. 6. 49. a. 8 H. 6. 34. b. 1 H. 7. 11. Thin. 10 Jac. Rot. 2508. Replevin muſt aſſign a Place as well as a Town. 2 H. 6. 14. a.

"JOhn Read brought a Replevin againſt Leonard Hawke for taking of his "Beaſts at Oculi, viz. one Gelding and one Mare, to his Damage, &c. "The Defendant demurred upon the Declaration, becauſe there was no "Place aſſigned, where the Taking was but only a Town. After Argument at the Barr, it was adjudged by the Court, that the Declaration was nought for the Cauſe aforeſaid; for the general Preſidents of the Court, and Form of Declarations in Replevins, is to aſſign a Place, as well as a Town, and in ſuch a Caſe, as well the Place as the Town is traverſable by the Avowant, wherein the Replevin differs from an Action of Treſpaſs, wherein the Plaintiff may aſſign his Treſpaſs only in one Town, and if he do aſſign a Place, the Defendant may plead at another Place, without traverſing the Place aſſigned by the Plaintiff; and then the Plaintiff may make a new Aſſignment, and the Reaſon is, becauſe the Replevin is an Action of more Certainty, and muſt of Neceſſity contain a place in the Count, as is ſaid by Brian and Starkie, in 22 E. 4. fol. 51. But the Caſe that rules this, was the Caſe in 35 H. 6. fol. 40. which you may ſee in the Book, &c. whereof the Record it ſelf is found Hillar. 35 H. 6. Rot. 466. Sur. ff. Alias prout patet termino ſancti Mich. Anno Reg. Dom. Regis nunc 35 Rot. 241. continetur ſic *Johannes Aſtead* ſummonitus fuit ad reſpondendum *Johanni Dimmocke*, de placito quare cepit averia ipſius *Johannis Dimmocke*, & ea injuſte detinet contra vad. & pleg', &c. & unde idem *Johannes Dimmocke* in propria perſona ſua queritur quod præd. *Johannes Aſtead* ultimo die *Junii*, Anno regni dicti Domini Regis nunc xxxiiii. apud *Totting* in quodam loco vocat. &c. cepit averia, *viz.* tres vaccas, & quatuor boviculos ipſi *Johanni Dimmocke*, & ei injuſte detinuit contra vad. & pleg. quouſque, &c. unde dicit quod deterioratus eſt, & dampnum habet ad valentiam xvil. & inde producit ſectam; & præd. *Johannes Aſtead* per *Wil. Twales* Atturnatum ſuum venit & defendit vim & injuriam quando, &c. Et petit licentiam inde interloquendi hic uſque à die S. Hillar. in xv. dies, & habet, &c. Ex aſſenſu præd *Johannis Dimmocke* idem dies dat. eſt idem præfat. *Johanni Dimmocke*, & hic, &c. Et modo hic ad eundem 15 diem S. Hillar. venit tam præd. *Johannes Dimmocke* in propria perſona ſua quam præd. *Johann. Aſtead* per Atturnatum ſuum præd. ſuper quo viſo, lecto, & intellecto, &c. per juſtic. hic plac. præd. quia in narratione præd. nulla fuit mentio in quo loco averia præd. capta fuer' eiſdem Juſticiariis videtur quod debit. advocationem per præd. *Jo. Aſtead* pro returno Averiorum præd. habend. primitus fact. extunc idem *Johan.* pro inſufficientiâ narrationis præd. return. Averiorum illorum habere debet, &c. Et ſuper hoc idem *Johan. Aſtead* pro return. Averiorum præd. habend. bene advocat, captionem eorundem averiorum in villa præd. in quodam loco vocat. *The Vicars Land.* Et juſte, &c. quia dicit quod quidam *Johan. Careles* vicarius Eccleſia S. *Mich.* de *Totting* diu ante tempus quo ſupponitur captionem præd. fieri, fuit ſeiſitus de duabus acris terræ cum pertinentiis in *Totting.* præd. unde præd. locus in quo, &c. eſt parcella ut Gleba Eccleſiæ præd. in Domino ſuo, de feodo in jure ejuſdem Eccleſiæ, & ſic inde

3 Cro. 896. que male Mo. 678. V. 4 E. 3. 13. In a Replevin, the Plaintiff counted of taking of his Cattle in H. without ſhewing, *In quodam loco vocat', &c.* and it was holden good, becauſe the Town or Hamlet is ſufficient. 21 J. 7. 22. In a Replevin, the Plaintiff counted of a taking at D. The Defendant ſaid, That he took them at S. and not at D. and no Exception was taken for Want of expreſſing of the paſture in Queſtion. V 9 E. 4. 41. & 25. The Uſe is to declare in a certain Place, but if the Place, be omitted it is good enough: and that is after this Preſident of 35 H. 6. Dy. 285, 14.

inde ſeiſitus diu ante captionem, &c. demiſit præfato *Willielmo Aſtead* præd. duas acras terræ habend. ab eodem die per quinque annos tunc prox ſequen. Quel *Willielmo* demiſe ouſtre al, defend. & iſſint avow pur damage feaſant & petit returnum eorundem averiorum, &c. Ideo conceſſum eſt quod præd. *Johan. Aſtead* habeat returnum averiorum præd. &c. Et præd. *Johannes Dimmocke* in miſericordia, &c. 1 Co. 22. a.

But yet it is true, that ſome Declarations in Replevin are found without any other Place and Avowries, and other Pleas made upon them without Demurrer or Exception to that Point, and then they are good enough.

(29) *Doctor* James's *Caſe.*

" SErjeant John More moved this Caſe, That whereas the Diocеſs of the " Biſhop of Wincheſter did extend it ſelf to the Borough of Southwarke, " as Part of the County of Surrey, that Doctor James Judge of the Audi- " ence of the Archbiſhop of Canterbury did of late uſe to keep a Court ſome- " times in Southwarke, and cite Men thither from the remoteſt Parts of the " Dioceſs of Wincheſter, being ſometimes ſixty Miles: And that further, " if they keep not their Day and Hour of Appearance, they were excom- " municated, and then could not be abſolved, except they would yield to " the tranſmitting of their Cauſe into the Archbiſhop's Court, where by " the Statute of 23 H. 8. cap. 9. was utterly illuded; and this he moved as " well in the Behalf of the Biſhop of Wincheſter, as of the Parties cited, " and prayed a Prohibition. Ro. 2. 313, 314.

" Whereupon, on the Part of the Archbiſhop it was anſwered, that no " ſuch Act of tranſmitting was uſed, but it was true that ſuch Courts had " been kept in Southwark, by the Space of forty Years and better, and that " by Law they might be kept; for the Archbiſhop may ſit in any Dioceſs " of his own Province, and may hear Cauſes ariſing within that Dioceſs " by his Prerogative, for he hath a concurring Juriſdiction with the inferi- " or Ordinary, but he cannot call them out of the Dioceſs by Reaſon of the " ſaid Statute of 23 H. 8. c. 9. And ſo the Biſhop of Wincheſter had no " Wrong, and the Party had no Hurt, and he is not called out of his Dio- " ceſs. Whereupon it was anſwered by the Court, that firſt the Tranſmit- ting of Cauſes (ut ſupra) was expreſly againſt the ſaid Statute of 23 H. 8. Next, that the Party in this Caſe hath a kind of Wrong: For whereas the Biſhop of Wincheſter himſelf, could not draw the People out of the Heart of the Dioceſs, where he lives himſelf, the Archbiſhops Officers would draw them thither as more commodious for them, if it were permitted. Beſides, it deprives the Subject of an Appeal, which he ſhould have had, if the Cauſe had begun with the inferior Ordinary. Stat. 23 H. 8. cap. 9. Mich. An. 19. Jac. Prohibition where one Eccleſiaſtical Court intrudes upon another. 2 Cro. 346. Apr. 178, 185.

And though the Controverſie concerning the Juriſdiction be between Spiritual Perſons, yet the King is the indifferent Arbitrator in all Juriſdictions aſwell Spiritual as Temporal, and that is a Right of his Crown to diſtribute to them, that is, to declare their Bounds. And it hath heretofore been held in this Court, that the ſuppoſed concurrent Juriſdiction, that the Archbiſhop of Canterbury is ſuppoſed to have in the inferior Dioceſs, was not as he was Archbiſhop, but as he was Legatus natus to the Pope, for the Archbiſhop of York neither hath nor claimeth any ſuch, and then that Power is ceaſed, being abrogated with the Pope, and the late Practice (if any hath been) is but an Uſurpation: And if it be permitted to be in the Archbiſhops meer Power, he may erect a Court of Audience in every Dioceſs, and call all Cauſes from other Ordinaries. Apr. 143. Cr. Jac. 345. 6. 13 H. 4. 5. Juriſdiction Br. 79. 2 Inſt. 613. Dent. 15.

(30) Rich *verſus* Kneeland.

Caſe.

" JOhn Rich brought an Action upon the Caſe againſt Arthur Kneeland, in " Banco Regis, and declared, that whereas the ſaid Kneeland was the " twentieth Day of January in the ninth Year of the King, and long before *London* T. in. 11 Jac. B. R. Rot. 1549 1 Rol. 2. in Abr. 2 Cro. 330. m.

Co. L. 39. a. Palm. 523. 4 Co. 84. a. 2 Saund. 380. All. 93. Action againſt a common Carrier for Goods loſt.

" had been a common Hoyman to carry Goods by Water for Hire, from " London to Milton in Kent, and from thence to London, and where by the " Cuſtome of England ſuch Carriers ought to keep the Goods delivered to " them to be carried ſafely, ſo as they ſhould not be loſt by the Default of " of them or their Servants, that he had delivered to the Defendant the " ſame twentieth Day of January a Portmanteau with 50 l. in it to be car- " ried, &c. for which he gave him two Pence the ſame 20th Day of January, " and that the Defendant had ſuffered the Goods to be loſt, through De- " fault of him and his Servants, upon the 25th of the ſame January the " Defendant pleadeth, that the Plaintiff the 21ſt of the ſame January did " diſcharge him of the keeping of them, which the plaintiff traverſed, and " and the Defendant demurred. Nota, he pleads no Diſcharge of the Carry- " ing: Alſo the Defendant by Demurrer in Law confeſſeth that there was " no Diſcharge of the Carrying; and it was adjudged for the Plaintiff. And now in the Exchequer Chamber upon a Writ of Error, the Judgment is affirmed, and it was reſolved that though it was laid as a Cuſtom of the Realm, yet indeed it is Common Law.

9 Co. 75. b.

(31) Loggin *verſus* Tetherton.

Debt. 2 Cro. 309, 338. 2 Cr. 607, 355, 190, 203. 10 Co. 133 a. Oxon. 2 Cro 355, 603. Mich. 9 Jac. B. R. Rot. 626. Yelv. 225. Trigintata libris. 10 Co. 133. a. Apr. 116, 119. 2 Cr. 290. Med. 645. Cr. Car. 417. 2 Roll. 147. Yel. 96. 105. ap. 19, 75.

" WIlliam Loggin brought an Action of Debt of 30 Pounds againſt Wil- " liam Tetherton, and upon Oyer of the Obligation, it was in trigin- " tata libris, the Defendant demurred in Law, ſuppoſing the Obligation " void: And it was adjudged good for 30 Pounds, and now upon a Writ " of Error in the Exchequer Chamber the Judgment was affirmed Yelv. 225. ultra im meſme l' Caſe.

(32) Woolaſton *verſus* Webb.

Aſſumpſit. Mich. 9. Jac.

Jenk. Cent. 292. B. R. & Exch. Cham. Noy 8. Apr. 218, 219. Pop. 31. 9 Co. 94. b. Aſſumpſit to pay debt upon Conſideration of further Day, no cauſe of debt. Ap. 216. Yel. 164, 184. Ro. 1 R. 379. 10 Co. 77. a. Lut. 219. 3 Cr, 213, 317, 683. 2 Cro. 548, 594, Yel. 56. 207. Dent. 5, 396, 164 and 184. Mo. 853, 854. 2 Saund. 136. 9 E. 4. 43. Cr. Car. 70. 9 Co. 93. b. 94. a. 1 Cr. 631. Pop. 31. All. 40, 73.

" HEnry Woolaſton brought an Aſumpſit againſt Edmond Webb, and decla- " red that whereas Webb did owe him 30 Pounds in Conſideration " that the Plaintiff the 28th Day of Auguſt 1610. had given Day to the De- " fendant for Payment of the ſame Money until the 9th of October following. " That the Defendant did aſſume to pay it him the ſame 9th Day, and up- " on Iſſue non aſſumpſit it was found for the Plaintiff, and Damages given. Now it was aſſigned for Error, becauſe it was not ſhewed for what the De- fendant was indebted. Now the Judgment was affirmed, for the Debt was not in Queſtion, as if it had been an Ordinary Indebitatus Aſſumpſit, where the Debt it ſelf is the only Conſideration of the Promiſe, for there it muſt appear to the Court, but here it is the Day given, that is the expreſs Conſideration: And though it be true, that there muſt alſo be a Debt, yet this is allowed in the Promiſe being actual, and alſo found by Implication in the Verdict.

Ejectione. Jenk. Cent. 292. Ro. 1 Abr. 350. m. 2 Ro. 704. Stiles 118. Plo. 208. a. All. 77. Excheq. Bridgman 103. Leaſe, which ſeemeth doubtful in the Limitation of the Term.

(33) Thomas Moore *verſus* John Muſgrave.

" THomas *Moore* debitor le Roy fuit plt. in ejectione firme per quo minus in Leſ- " cheq. verſus *Johannem Muſgrave* defend. & Count. q. un. *W. Moore* 5 Maii " Anno 10. Regis nunc ad *Clergill* in Com. *Cumbriæ* leaſed al. dit *Thomas Moore* " le plt. un. meaſe 40. acr. terræ 20. acr. præd. & 50. acr. paſtur', ove les appur- " tenances in *Clergill* præd. habend. del Feaſt jour del Annunciation del bleſſed " virgin S. *Mary Donques* darreine paſſe pur viginti un annis extunc prochein en- " ſuant & le ejectment eſt allege d'eſtre le dit 5 Maii 10 Regis Sur rien culpable " trove fuit un eſpecial verdict a ceo effect. viz. Que devant le dit demiſe le dit " *W. Moore* fuit ſeiſie delt dits terres in fee & ſic ſeiſit. le dit. W. le dit 5 die " Maii 10. Reg. ſupradict. fiſt un Indenture del leaſe al dit *Thomas Moore* le plt. " le quel eſt trove in hæc verba, ſcilicet, demiſit tenementa præd. habend. le dit " meas ou tenement, ove les appurtenances *from the Feaſt of the Annunciation of* " *the Virgin* Mary *laſt paſt, for and during the Term of twenty one Years next enſu-* " *ing the Date hereof fully to be compleated and ended.* Per force de que le plaint. " fuit poſſeſſe tanque fuit eject' per le defendant le dit 5 Maii 10 Regis. Mes

quel

" quel ſur tout le matter le defend. fuit culp. del treſpaſs & ejectment en le Count " mencon. ils ceo referre al Court.

Dy. 286.

Euq. le queſtion fuit, ſi le leas trove per le Jurie accord ove le leas mencon. in le count per unterme d'ans ou ne my eo q. le leas per count fuit un leas fait 5 *Maii* 10. Reg. habendum de le Feaſt d'Annunciation donques darreine paſſe pur 21 Ans extunc ſcil. del dit Feaſt d'Annunciation prochein enſuant. Mes le leas trove per le Jurie fuit un leas fait le dit 5 *Maii* 10 Regis per Indenture geren' dat. 5 *Maii*, Anno 10 Regis habendum de feſto Annunciationis beatæ *Mariæ* Virginis tunc ult. præterito pro term. viginti unius annor. prox. ſequen. dat. dictæ Indenturæ. *It was adjudged for the Plaintiff in the Exchequer, and now affirmed by the Opinion of the Chief Juſtice and my ſelf, by the Lord Chancellor and Treaſurer.*

Sty. 118, 119.

Judgment.

(34) Fitzhughes Caſe.

Obligation.

EDwardus *Bridge* de, &c. Gen. & *Franciſca* uxor ejus alias dict. *Franciſca Fitzhugh* de, &c. Gen. ſummum. fuer' ad reſpond. *Nichol. Fitzhugh* Gen. de placito quod reddant ei octoginta libras, quas ei debent & injuſte detinent, &c. Et unde, &c. Et count ſur Obligation fait per Femme dun ſola fuit. Mando, &c. Et petunt auditum ſcripti præd. & eis legitur in hæc verba. Noverint univeſi per præſentes me *Franciſcum Fitzhugh* de *Goodwick* in Com. *Bed.* Gen. teneri & firmiter obligari *Nichol. Fitzhugh* de *Eaton* in dicto com. Gen. in octigent. libris bonæ & legalis monetæ *Angliæ* ſolvend. eidem *Nicholao* aut ſuo certo Attornato vel executoribus ſuis in feſto St. *Mich.* Archangeli prox. futuro. Ad quam quidem ſolutionem bene & fideliter faciend. obligo me, hæredes, executores, & Adm. meos firmiter per præſentes ſigillo meo ſigillat. dat. viceſimo tertio die *Novemb.* Anno regnor. *Phil. & Mariæ* Dei gratia Regis & Reginæ *Angliæ, Hiſpaniæ, Franciæ* utriuſque, *Ciciliæ, Jeruſ. & Hiberniæ*, Fidei defenſor. Archiduc. de *Auſtriæ*, Duc. *Burgundiæ, Mediolan, Brabantiæ*, Comitum *Hausburg, Flandriæ & Tyrol* quarto & quinto, quo l' co & audito iidem *Edw. & Franciſca* petunt Judicium de brevi & narr. præd. quia dicunt quod præd. N. per br. & Narrationem ſuam præd. ſuppon. quod præd. E. & F. debent præfato N. octogint. libras quas eidem N. redderent, ubi revera non habetur aliquod tale verbum in ſcripto præd. continens & warrantizans hoc verbum in br. & narratione præd. ſpecificat, viz. octogint. & in eodem ſcripto obligatorio præd. hæc duo verba, viz. octigenta ſunt ſcript. & content. Quæ quidem duo verba octigentâ nullam habent in ſe ſignificationem de aliqua ſumma certa, ſicq; br. & narratio præd. non warrantizant de & ſuper ſcript. præd. per præfat. N. hic in Curia probat. Per quod iidem E. & F. petunt Judicium, & de breve & narr. præd. &c. Et quia præd. N. exceptionem præd. q. per inſpectionem brevis narr. & Script. præd. Cur. hic ſatis conſtat non dedicit, ideo conceſſum eſt præd. N. nihil capiat per billam ſuam, ſed ſit in miſericordia pro falſo clamore ſuo, &c. Et quod præd. E. & F. eant inde ſine die, &c. Conceſſum eſt etiam quod præd. E. & F. recuperent verſus præfat. N. dampna ſua occaſione premiſſorum ad tempus eiſdem E. & F. per diſcretionem Juſtitiariorum ad requiſitonem ſuam promiſis & cuſtagiis ſuis in ea parte ſuſtentat. juxta formam ſtat. &c. per Curiam his adjudicat.

Mich. 3 & 4 El. Rot. 1350. C. B. 2 Ro. 147. Ap. 75. Ant. 18, 116. In an Obligation, octigentas for octoginta. 1 Cr. 418. 10 Co. 133. a. Yelv. 95, 96, 105.

1 Co. 22. a.

(34) Parker *verſus* Keneday.

Obligation. 2 Cro. 208. Brnl. 62. Tr. 6 Jac. Rot. 1020. Seſſanta libr, Bone obligation qua in Italian. 2 Cro. 208. Ro. 2. 147, 116. Yelv. 96. 105. Ap. 119.

NArr. per *Parker* verſus *Keneday*, & ſa Femme ſur deux Obligations un de 60 lib. & l'auter de 40 lib. defendens petit auditum præd. primi ſcripti & ei legitur in hæc verba, Noverint, &c. in ſeſſanta libris, &c. quoad præd. 60 lib. de præd. 100 lib. defendens demurre & quod alteram obligationem non eſt Factum & Judicium ſur demurrer pro quer.

Obligation. (36) Maſdame *verſus* Jolly.

Hill. 10 Jac. R. 1830. 1 Co. 47. 15. 2 Ro. 147. 2 Cro. 338. Cr. Car. 418. Styl. 242, 257.

NArr. per *Maſdame* verſus *Jolly*, ſur Bond pro 60 lib. defendens petit auditum ſcripti, &c. & ei legitur, &c. Noverint, &c. in ſexaginta libris, &c. & ſur ceo Demurrer, & Judicium pro quer.

Warr. Chart. North. (37) *Sir* Henry Roll the younger, Khight, againſt *Sir* Robert Osborn.

Trin. 9 Jac. R. 2205. Winch's Ent. 11, 27. 4 Leo. 250. Meſme Ca. Mo. 859. 1 Co. 1. 2 Brownl. 169. Plo. 333, 411, 325. b.
The learning of Warrantia Chartæ, and of warranties general at large. Judgment was given for the Defendant. Note, the Caſe reported here is the Argument of *Hobart* Chief Juſtice only. But yet in this Caſe, divers Points were reſolved by the Juſtices. 1. That he, that cometh into an Eſtate ſhall never have a Warrantia Chartæ 29 Aſſ. 34. The Lord, who comes in by Eſcheat. 21 H. 6. A Diſſeiſin, 19 H. 6. 25. & 10 H. 7. 10. Tenant by the Curteſie made a Warrantia Chartæ. 2. That the Warrantia Chartæ did not lie in this Caſe, becauſe by the Recoveror Sir *Henry Roll's* was in of another Eſtate; and a Warranty lyeth only upon an Eſtate continued, and not altered, and ſo it was reſolved 34 Eliz. in B. R. in *Kemp* and *Henningham's* Caſe, & 41 Eliz. *Bainton* & *Cheſter's* Caſe.
V. *Moor's* Reports 859. &c.

" SIr Henry Roll the younger, Knight, brought a Warrantia Chartæ againſt Sir Robert Osborn and Margaret his Wife, that they ſhould warrant unto him one Meſſuage, Forty Acres of Meadow, and ſeven Hundred Acres of Paſture in Kill-March, and declared that Robert Osborn, Margaret, and one John Gobert did levy a Fine, Anno 2. of the King, unto the ſaid Henry Roll of the ſaid Tenements, inter alia, by the Name of the Manor of Kill- March, and divers other Quantities of Lands; and by that Fine Robert Osborn, and Margaret, did grant for them and the Heirs of Robert, that they ſhould warrant the Manor and other the Premiſes to the ſaid Henry and his Heirs, againſt him and his Heirs, and againſt all Men; which Fine, as to the Meſſuage and Lands in Queſtion, was to the Uſe of Henry Roll and his Heirs; and then ſhews, that he being ſo ſeized, one Ralph Perne did implead him by Writ of Entrie ſur diſſeiſin in le Per. in the Common Pleas, for the Houſe and Lands in Queſtion (but doth not tell otherwiſe when) hanging, which Plea Henry Roll required the ſaid Robert and Margaret to warrant unto him the ſaid Meſſuage and Lands in Queſtion, or to miniſter unto him a Plea in Barr of the ſaid Action, which to do they refuſed, to his Damage of one Hundred Pounds.

" To this the Defendant pleaded, confeſſing the Fine, Warranty and Uſe, but further ſaith, that Henry Roll being ſeized of the Tenements in Queſtion by Force of the ſaid Fine, that one William Gibbs and Thomas Stephens Eſquires, before the purchaſe of this Writ of Warrantia Chartæ, ſcilicet the ſeventh Day of November, in the ſecond Year of the King, did ſue a Writ of Entry in the Poſt, againſt the ſaid Henry Roll, of the ſaid Meſſuage and Lands in Queſtion, inter alia per nomina Maneriorum *Kill Marſh.* &c. retor. xv. *Martini*: At which Day the Demandants, and the ſaid Henry Roll, ad tunc tenens liber tent. Maneriorum, &c. exiſtens did appear. And the Writ was returned, and the Demandants declared and demanded all the Manors, &c. And Henry Roll the Tenant called to Warranty Robert Osborne Knight, without ſaying præd. Robert Osborne, and he the common Vouchee. And ſo the Recovery paſſed, and a Writ of Seiſin of all the Manors, &c. And that the ſame Recovery, as to the Meſſuage and Lands in Queſtion, was to the Uſe of Sir Henry Roll for his Life, and after his Deceaſe, if a Marriage ſhould be had between him and one Katharine Haſelwood, then to the Uſe of her for Life, and after to the Uſe of any other Woman, that he ſhould Marry, and then to the Uſe of the firſt Son of his Body by Katharine Haſelwood, and ſo to the tenth, one after another, and then to the Uſe of ſuch Perſon, as ſhould be Heir Male, of the Body of the ſaid Henry Roll, and the Heirs Males of his Body, and after to the Uſe of Henry Roll, Father of the ſaid Henry the Plaintiff, and avers, that Henry the Plaintiff is not alive, and ſo demands Judgment of the Action; and the Plaintiff thereupon demurrs in Law, and ſo the Demurrer is joined.

I will handle this Caſe ſo, as beſides the Points concluding, I will by the Way diſcuſs all Incidents to a Writ of Warranty of Charters.

Bract. tr. de warran. Chartæ cap. ult.

The Caſe is Rare and of Importance, for a Suit is pugna civilis, whereof Bracton ſpeaks prettily, Tractatu de Warrantiis Chartæ capitulo ultimo: Sicut actores

actores armantur actionibus & quaſi gladiis accinguntur, ita res muniuntur exceptionibus & defenduntur quaſi Clypeis.

The Writ of Warranty of Charters, as to the Firing of the Warranty, and Binding the Poſſeſſion of the Warrantor, is either provisional or remedial.

The firſt is in caſe of Fear and Proviſion.

The ſecond in caſe of Loſs already ſuffered, and to be recompenced by Value per excambium, as Bracton ſpeaks. Bracton.

I hold therefore firſt, that nothing appears in the Count in the principal Cauſe, but that the Plaintiff ought to have Judgment.

I hold again, that upon the Barr confeſſed by the Plaintiff's Demurrer Judgment is to be given againſt the Plaintiff.

A Writ and Count in a Warrantia Chartæ muſt have four Points compleat in them, that is to ſay,

Firſt, he that brings it muſt be Tenant of the Land the Day of the Writ purchaſed. Point 1.

It muſt be by a Conveyance, whereby the Land, whereunto the Warranty is annexed muſt paſs, or at leaſt, if right be releaſed, or Confirmation made with Warranty, he muſt be Tenant of the Land, to whom it is made in Warranty. Point 2.

This Writ muſt be brought hanging the principal Plea. Point 3.

It muſt contain the Specialty of the Warranty and Lien. Point 4.

All theſe Parts this Writ and Count doth contain; and yet, being theſe Rules receive Diſtinctions, I will explain them, that it may appear how they ſtand with their Diſtinctions.

And as to the firſt Point.

The Plaintiff is made Tenant of the Land in Demeſne; for of that there hath been great Queſtion, whether the Vouchee or Defendant in the Warrantia Chartæ, that hath a Warranty over, may have a Warrantia Chartæ, whereof I make the Reſolution upon all the Books thus. That it is a good Plea in the Warrantia Chartæ, that the Plaintiff was not Tenant of the Land the Day of the Writ purchaſed, and ſo are the Books of the 24 E. 3. 25. 7 E. 4. 12. & 17 E. 3. 44. 16 H. 3. F. Garrantie des Charters 29 Bracton tractatu de Warrantiis Chartæ 18. Thus in Warrantia Chartæ defendens poteſt excipere quod querens non tenet terram, de qua petit Warrantiam. Explanation of the firſt Point. 4 Le. 223, 347. 2 Ro 810.

But it ſeems to be a Plea but prima facie, for it is allowed alſo 7 H. 4. 18. And yet it is concluded, that the Vouchee may have the Writ, when he cannot Vouch, even as a ſecond or third mean Lord, may have a Writ of Meſne as well as the Tenant in Demeſne, and ſo 3 E. 3. Fitz. Warrantia Chartæ 4. the Defendant pleaded, that the Plaintiff was not Tenant the Day of the Writ, and Iſſue upon it: But Fitz. abridging the Caſe ſaith, that if he had pleaded himſelf Tenant by Voucher, the Day of the Writ purchaſed, it would have ſerved; and 31 E. 3. Fitz. Warrantia Chartæ 22. in Fine, Burton ſaith, that the Defendant in Warrantia Chartæ ſhall have a Writ of Warranty of Charters over hanging the Writ againſt him, and Reaſon and Juſtice requires it, ſince this Writ is ſupplementary in Place of Voucher, where that cannot be had; therefore is this Writ as well to be allowed after Alienation, as Voucher is allowed, for Alienation cannot be imputed unto Folly; for as a Man may Vouch, coming in as Vouchee, ſo this Writ, as it is in Nature of a Voucher, is equally to be allowed: And therefore 41 E. 3. 7. if the Tenant by the Curteſie grant his Eſtate with Warranty unto I. S. and comes in as Vouchee, he ſhall have Aid of him in Reverſion, as if he were Tenant in Poſſeſſion: And 43 E. 3. 23. If a Copartner make a Feoffment with Warranty, and comes in as a Vouchee, he ſhall be able to deraign the Warranty paramount, as if he were in Poſſeſſion; but where it hath been ſaid, that upon a Releaſe or Confirmation with Warranty, a Man cannot Vouch, and therefore he ſhall have a Warranty of Charters, 12 H. 7. 12. 2 Ro. 810. 2 Ro. 810. Co. L. 174. a. Ap. 26. 2 Ro. 809, 744.

It is clear, that as to him, that Warranted, he may, 4 E. 2. Fitz. Voucher, 244. & 1 H. 4. 19. 38 E. 3. 13. But the Cauſe may be ſo, as the Demandant may Mo. 862.

map counter-plea the Voucher, and then the Tenant is driven to his Warranty of Charters, for Default of his Voucher in Deed: And ſo the Book 12 H. 7. is in that Senſe true, for if the Defendant ſhould Vouch, as he may, againſt the Warrantor, and be counter-pleaded by the Demandant, truly he ſhould loſe his Land and the Aid of Voucher too; for he were paſſed the Requiring of a new Plea of the Warrantor, when he had been by the Voucher counter-pleaded before.

2 Inſt. 245.

As to the ſecond Point, ſee 24 E. 3. 35. where the plaintiff in Warranty of Charters counted, that the Defendant infeoffed him by the Charter with Warranty, the Defendant pleaded riens paſſa per le fait & *Bracton* tractatu de Warrantia, *cap.* 9. *Sect.* 5. Excipere poteſt Warrantus quod licet Charta de Feoffamento ſufficiens fuit, tamen donum fuit inſufficiens, quia donatus nunquam habuit ſeiſinam in vita donatoris, ſed poſt mortem ſuam intruſit.

Explanation of the 2 Point. Mo. 860. 2 Inſt. 245.

Alſo 44 E. Fitz. Garr. Char. 18. upon a Releaſe with Warranty pleaded, that the Party, to whom the Leaſe was made, had nothing at the Time of the Releaſe made.

Godb. 151. N. B. 134. K.

And to the third Point, the Regiſter 158 affirms that Rule; and addeth, ſi judicium inde redditum ſit, non valet hoc breve. But this muſt be well underſtood, for clearly it may be brought before any principal Plea, and after the Plea take any other, and then by Judgment, or by Diſcontinuance, and the like. And I am of Opinion, that before Execution it may be brought, if the party prayed his Plea in Time, for till Execution, he is in of the Eſtate warranted: But if the Execution be had, then the Warranty fails with the Eſtate.

Explanation of the 3 Point. Mo. 860.

To the fourth Point, this Writ and Count is in Place not of the Voucher, for this is General, but of the Vereigning of the Warranty in Caſe of a Voucher; and yet in ſome Caſes it ſhall not need to be ſo Special, as the Vereigning; and therefore if a Man bring a Wartantia Chartæ upon a Warranty of Land, and ſhall obtain Judgment, he ſhall uſe that Judgment after for Rent demanded or recovered, if the Warranty did extend unto the Rent, 31 E. 3. Fitz. Garr. Chart. 22.

Explanation of the 4 Point. 2 Ro. 810.

And yet upon a Voucher in like Caſe it ſhould have been more Special, the Reaſon is apparent, for the Rent is demanded when he vouched; but it may be it was not foreknown that Rent would be demanded, when the Writ of Warranty of Charters was brought: But if it were, he ought to declare Specially the rather, if he cannot vouch in the principal Plea of the Rent, for there muſt be a Means to diſcuſs, whether the Rent in Demand be to be warranted as a Rent ſuſpended, when the Warranty was made, ſo as the Land was warranted, as diſcharged of Rent.

Inſt. 366.

Now to the Objections, that have been, or may be made againſt the Count.

Object. 1.

Firſt, it may be objected, that he makes the Cauſe of Action, becauſe he was impleaded in a Writ of Entry in le Per, in which Action he may Vouch; and then by Fitz N. br. 134. D. & I. it may ſeem he cannot have this Writ. To this I anſwer, that the Writ of Entry in le Per doth admit a Voucher indeed, but that muſt be within the Line; but the Writ of Entry in le Per in the Declaration is laid generally; and ſo might in the Per by ſome other, and not by Osborn, and then by that Means being deprived of Voucher, he muſt be admitted to this Writ; for ſo it is provided by the Stat. of Weſtm. 1. cap. 40. expreſly.

Anſw. 2 Ro. 810.

But my plain Anſwer is, that the Writ of Warranty of Charters will lie upon all Actions real, and may be brought either before, or hanging thoſe Actions, though a Voucher lie in the Actions, and ſo it is reſolved 9 E. 2. Fitz. Warr. Char. 30. 18 Edw. 3. 42. Fitz. Garr. Chart. 8. though it be in a Formedon; this is beſt in the Abridgment: And 2 E. 3. fol. 6. in a Warranty of Charters againſt the Heir, he Pleads that the Formedon is hanging of the ſame Land, & non allocatur, although he may rebut. 41 E. 3. of Garr. Char. 19. in Formedon, and Fitz. Nat. 135. D. where his Words are, that a Man ſhall have a Writ of Warranty of Charters, though he may Vouch in the Action, that is brought againſt him; and if he recover, and after loſe in the Action, wherein he Voucheth, he ſhall have a Writ of Habere facias ad valentiam within the Year after a Recovery in Warrantia Chartæ, and the Reaſon of this is Clear, for he ſhall bind the Land from the teſte of the Warrantia Chartæ (though he cannot have Execution untill he take

Inſt. 102. a.

take Loſs) And upon the Voucher he ſhall have it but from the Time of the Voucher, which may be delayed; and therefore I am of Opinion, that he may bring it even after Voucher, becauſe that action may be diſcontinued and fail many Ways, and ſo the Warranty of Charters be neceſſary, and this Reaſon is expreſly given both in 9 E. 2. and by Fitz. Nat. Br. and Fitz. Nat. Br. in other Places 135. A. muſt be underſtood that he muſt not rely upon this Warranty of Charters, but he muſt alſo vouch and requeſt Plea according to his Caſe, as he ſaid 135. A. And ſo is 19 E. 3. F. Garranty chartes 9. 31 F. Garranty chartes 22. 18 E. 3. 42. F. Garranty chartes 8. beſt in the Abridgment as before I have ſaid, and it is the beſt for him, that is to warrant, to make Entry of the Plea, that he tenders in the Record of the Action, in which he is to plead per Brian 16 H. 7. 6. pet I ſee not well how that can be, for both Requeſt and Tender and Matter of Fact. 2 Co. 187. b.

And thereupon another Objection may be made, that ſince he ought to vouch and hath not, he can have no Benefit of Warrantia chartæ. *Object.* 2.

This is already anſwered in Part by the Nature of the Voucher in the Lieu, and alſo it appears not that it was come ſo far as he might vouch. *Anſw.*

If it be objected that he hath laid that he did requeſt to have a Plea in Barr miniſtred, where the Vouchee may plead in Abatement, as well as in Barr as an Entry of the Demandant ſince the Voucher: For if it were before it muſt be pleaded by him to retort the Warranty, becauſe the Tenant did not plead it himſelf. *Object.* 3.

It is anſwered, that he counts that he did require the Defendant to warrant the Land, which is enough; And ſo in the Book of Preſidents, for that imports that he ſhall Warrant according to the Nature of the Caſe by the Voucher; if he be vouched, or otherwiſe by Plea, and therefore the Adding of Requeſt of Plea in Law is Surpluſage. Surpluſage hurts not in the Count, or the like.

It is objected, that he hath declared to his Damage, where no Loſs appears, It is true, that he ſhall recover no Damages but where he hath taken Loſs by Recovery already had againſt him, 41 E. 37.———3 E. 3. 21. & 18 E. 3. 42. F. Gar. char. 8. and therefore he ſhall not have Damage, where the Warranty of Charters is brought before the Action quia timet. And ſo is 21 H. 6. 22. and therefore if it be pleaded by the Defendant, that the Plaintiff is not impleaded, the Plaintiff ſhall preſently have his Judgment, but no Damages, But pet he ſhall declare to Damage according to the Form, which is not ſtrange in many Caſes as in a Quare Imped. for the King. *Object.* 4. Ap. 217. 39. 10 H. 7. 13. 6 Co. 51. b. Inſt. 343. b.

The Loſs, whereupon the Plaintiff may have Damage, is not only wherein the principal Action Damages were recovered againſt him, as in an Aſſize or the like; but alſo where the Land hath been recovered only, as in a Formedon or the like; 41 E. 3. F. Gar. char. 19. 42 E. 3. 7. 43 E. 3. 20. But pet the Caſe of 43 E. 3. 20. is Inter Anomala, for there the Caſe was, that where one Charnel had made a Warranty againſt himſelf and his Heirs, and all others ſuing by his Colluſion; upon a Warrantia Chartæ, it was found that the Principal Action, (a Formedon) was brought by his Colluſion pet he could have no Damages, becauſe he had not loſt the Land, whereupon he had now brought a Writ of Deceit upon the Trouble and Charge that he ſuffered by Colluſion and Suit, and declared upon the Verdict in the Warr. chartæ, finding the Colluſion as binding the Defendant for that Point. And ſo becauſe the Defendant could not deny that the Court gave Judgment and 20 l. Damages. But note that this foreign Action is no ground for the like in other Suits of Warranties of Charters; for this particular Warranty grew upon a Colluſion, which is nothing to other Warranties; and ſuch a Practice by Colluſion will bear an Action with Warranty. The only Uſe of that Caſe was, that they allowed the Verdict in one Action to be a Conviction of Colluſion in another, which was hard enough.

As to the Objection made by my Brother Nichols, that by the Count it ſelf appears the Warranty is loſt, by Reaſon that this Part of the Land is declared upon the Fine, to be to the Uſe of the Plaintiff, and the reſt ſhall be intended to the Uſe of the Defendant, who made the Warranty. *Object.* 5.

A

I anſwer it three Ways.

Anſwer 1. Firſt, that there can be no Inference touching the Uſe of the Reſt, becauſe there is no Mention of it in the Count, but a meer Omiſſion, neither is there any Cauſe that it ſhould be holden confeſſed and not denied, for it is in no Sort within the Count, or the Reaſon of it, which is to Demand only Warranty of this Parcel of Land, which was put in Suit in the Writ in the Per, ſo there is no Cauſe for this Purpoſe to ſpeak of the Reſt of the Lands, ſaving the Neceſſity of the Form in pleading a Fine or Recovery, which is a Record, which muſt be pleaded intire; whereas if it had been a Feoffment, it might have been pleaded for this Parcel of Land only, 22 E. 4. 8.

Plo. 410. b. Apr. 276. 293. Plo. 411. b. 353. b. 269. b.

Anſwer. 2. Another Anſwer is, that it appears out of the Barr of Osborn that the whole Manor, &c. was demanded in the Writ of Entry in the Poſt againſt the Plaintiff, Sir Henry Roll being Tenant of it, and that he vouched of the Whole, and Judgment paſſed, which proved by the Confeſſion of Osborn, (that is, to imprach the Warranty) that he was Tenant of all, and ſo he muſt have the Uſe of all.

Anſwer 3. Another Anſwer is, that a Warranty may be extinguiſhed indeed by Releaſſment to him that warrants, but it is againſt Nature to ſay, that any Thing can be extinguiſhed, that never was, for here the Coniſor ſhould make a Warranty, provided that it ſhould be no Warranty or void, ſo the ſame Man, that makes it ſhould kill it in the Birth, therefore I hold it plain that the Warranty, which ſeemeth literally intire, ſhall by Act of the Party, and Conſtruction of the Law be divided in this Caſe, ſince it cannot take Effect according to the intire Word: As if I infeoff H. of a hundred Acres in Fee to the Uſe of himſelf for fifty Acres, and of the Feoffee or of a Stranger for the other fifty Acres certain, and Warrant the Lands to the Feoffee and his Heirs; this Warranty is clearly divided by the Meaning againſt the Letter, for the Warranty, for ſo much, as is to the Uſe of the Feoffor himſelf, and his Heirs, that doth Warrant, never took Effect, and when it is divided to two, that Word, that ſeemed intire at the firſt, is to be taken reddendo ſingula ſingulis; for this Purpoſe, the Caſe of the Lord Dacres 26 Eliz. was reſolved thus, William Lord Dacres made a Deed of Feoffment of Lands in divers Counties dated 15 Octob. 4. Mariæ upon Condition the Feoffee ſhould infeoff him, of all the Lands within twenty Days after the Date of that Deed, and it was reſolved, that if William Lord Dacres did make his Feoffment but of Part within the twenty Days, the Condition was not broken, though all were not reconveyed within the twenty Days, according to the Letter of the Condition, which is intire as the Warranty, the Reaſon was, becauſe it was his own Fault that it was not conveyed, without which it could not be reconveyed, and therefore the Letter was abridged, the Condition being taken that he ſhould reconvey ſo much, as was conveyed: But now the Caſe ſtanding thus upon the Plaintiffs Declaration, all the Impediments ariſe upon the Plea of the Defendant, which is confeſſed by the Demurrer. Out of which ariſe theſe Points.

5 Co. 76. b. 7. b.

Now to the Barr. That the Plaintiff having the whole Manor conveyed unto him by Fine with Warranty from Osborn.

1 He hath divided the Land.

2 Next he hath divided and changed the Eſtate.

3 Then he hath done this by Common Recovery, by which they, that come in, are in the Poſt.

4 Again, he hath vouched Osborn once already in that common Recovery, and ſo hath had Recompence or Poſſibility of it by Judgment.

This Point is to be underſtood if the Voucher of Oſborn, as is already alledged, ſhall be underſtood of the ſame Osborn, becauſe it wants the Word prædict.

5 But if it ſhall not be underſtood the ſame, then it will come to this Queſtion. If a Man have divers Warranties againſt divers Perſons, and then in an Action brought againſt him voucheth one, and omits the other, and ſo a Recovery

very passeth with a Judgment of Value, whether he can ever have Benefit of the other Warranty.

And upon this will arise a Question by way of Distinction, Whether this will be all one, whether the Recovery is upon Title, and where it is a common Recovery, and under what Differences. And first in General, which is a kind of Key to the Particulars, that shall follow, I observe, that a Warranty is a great Servitude upon him that Warrants, and upon his Estate, and is a Servitude against common Right, and hangs like a Cloud over him and his Inheritance, as Hannibal said of Fabius Maximus, so it is in Law taken Strictly and Litterally.

And therefore if a Man convey Land with Warranty against him and his Heirs, his Heir on the Part of the Mother shall not be vouched by this, as long as there is an Heir on the Part of the Father, 19 R. 2. ff. Garr. 100. 49 E. 3. 11. except it be by Reason of a Signiory of Lands of the Part of the Mother, 5 E. 2. Fitz. Avowry 207. And if he that warranted have no Lands but Gavelkind, yet the Tenant may Vouch the very Heir alone, 38 E. 3. 22. but it is true, that he may Vouch also the other Heirs for Possession, and so he may Vouch together with the Brother, which is Heir unto the Father Warrantor, the Sister, who hath the Land by possessio fratr. 32 E. 3. ff. Voucher 94. 42 E. 3. 3. But if the Land warranted comes unto a Sister by possessio fratris, or to a Younger Brother by Borough English or Gavelkind, she is without Remedy, for she cannot Vouch as Heir alone, except she comes in as Vouchee for Possession with the very Heir, 32 E. 3. Fitz. Voucher 94. and 35 H. 6. 33. Yet note, that if a Man bind himself and his Heirs in an Obligation, and leaves Land at Common Law, and Land in Gavelkind, the Creditors must sue all the Heirs, 11 E. 3. F. debt. 7. 11 H. 7. 12. And so in that Case, if he have one Heir on the Part of the Father, and another Heir on the Part of the Mother, and both have Land by Descent, he shall have several Actions, and Executions shall cease till he may take it against both; so it appears that the Construction of Law is stricter where the Heir is charged with Warranty Real, than where he is charged with a Chattel. Upon the same Reason the Case is adjudged 18 H. 3. ff. Voucher 281. and 23 E. 3. ff. Garr. 77. If a Man grant a Signiory with Warranty, and the Land Escheats, the Warranty is utterly lost, and not only for the Over-value, though it come by Act in Law, for the Book of 23 E. 3. says, that a Covenant shall be taken strict. per Welby: And that the Warranty is Lost, is adjudged 18 H. 3.

Co. L. 376. b. Plo. 445. b. 2 Ro. 746.

Charge of Heirs upon Warranty, or upon Obligation differ. Co. L. 376. a. b. 2 Ro. 746.

2 Cro. 218. Co. 225. b. Co. 3. 13. a. 1 Inst. 376. b. Co. 8. 52. b. Co. L. 102. b. Yel. 56.

2 Cro. 218. Apr. 287.

Inst. 392. t. 2 Ro. 742.

Now to the first Objection, that the Demandant hath divided the Land by his own Act, scilicet the Recovery after the Warranty created. It is to be observed, that the Warranty must remain entire as it was created, without the voluntary Division of the Party. And therefore if Land be given to two jointly with Warranty, if the one made a Feoffment of his Part, he hath lost his Warranty, but the other may Vouch for his Moiety; but if they make Partition, both have lost it by the Common Law. And if the Warranty were to the Jointenants and their Assigns, the Assignment must also be joint, 29 E. 3. ff. Garr. 70. 11 E. 4. 8. Coke lib. 4. fol. 36. Terringham's Case. If a Man have a Common Appendant in Forty Acres, belonging unto Twenty Acres, if he sell Ten of his Acres, or buy Part of the Forty Acres, the Common may be divided and apportioned pro rata; but if it be a Common Appurtenant, because it is against common Right, it is Lost.

If a Man have a Rent-charge granted of Twenty Pounds a Year, and he grant five Pounds a Year of it to a Stranger by Fine, the Tenant is not compelled to Attorn.

So in these, and the like Cases against common Right, I must not be made subject to divers Vouchers, or Suits of Warranties of Charters, or to sundry Distresses, where my Grant made and meant but one.

To the first Objection, *viz.* The dividing of the Lands. Apr. 235. Co. L. 385. a. 187. a. 193. b. 4 Le. 251.

6 Co. 12, 13. Mo. 203. Co. L. 187. a.

Co. L. 122. a.

Apr. 235. Hurr. 58. 8 Co. Wyat Wild's Case.

Now secondly, where he hath changed his Estate, the Case is worse, for the Estate must remain the same in the Privity, or must be made the same in Representation, that it was in the Time of the Warranty created, when you come to Vouch, or to bring your Warrantia Chartæ; and therefore, if the Husband and Wife be Jointenants, and a Release be made to them with Warranty, and then the Husband alone makes a Feoffment over with

To the second Objection, *viz.* The changing of the Estate. Co. L. 193. b. 185. a. b. Co. 3, 6. a. b. 5 Co. 6. b.

Warranty, and is thereupon vouched alone, he cannot Vouch over, 10 E. 3. 52. Fitz. Counterplea of Warranty 15.

1 Co. 122. b.

Lo. L. 191. b. Co. 3, 6. a. b.

So if a Woman, Tenant in Tail, and her Husband make a Leaſe pour autre vie, if in an Action they be received they cannot Vouch over, 45 E. 3. 18. and 46 E. 3. 24. But if the Leaſe had been only for the Life of the Woman, upon the Receit they might have vouched, for by Repreſentation they are in of the firſt Eſtate.

Co. L. 165. a.

As when Lands and Warranties deſcend to two Parceners, and they make Partition, and one of them is impleaded, he ſhall not Vouch alone, but ſhall pray Aid of his Fellow, and ſo ſhall put themſelves in Repreſentation of one Heir, and then Vouch together. But if one Parcener Alien his Part, or make Default upon Aid prayed, the other ſhall Vouch alone, 27 H. 8. 58. 4 H. 7. 20 H. 6. 2. and 43 E. 3. 23.

Co. L. 174. a. Deut. 21.

If two Co-parceners be, and one of them Alien with Warranty, and comes in as Vouchee, now he ſhall pray in Aid of his Fellow, and either have pro rata upon the Loſs, or Vouch over with him upon the Warranty paramount.

Co. 3, 6. a. b. Co. L. 174. Ap. 480.

But note in theſe Caſes, that the Vouchee (when he will avoid the Warranty by Change of Eſtate) he muſt ſhew how the Eſtate is changed, 3. E. 3. 51. And ſo hath the Defendant done here in the Principal Caſe.

Apr. 480.

And as this Caſe is here, it is yet more Dangerous to the Defendant, for though it be true, that if a Man enter into a Warranty General, he ſhall Warrant no other Eſtate, than that the Tenant hath, 44 E. 3. 38. 41 E. 3. 7. where the Vouchee Demands not the Lien, nor the Tenant makes not any ſpecial Declaration of it, as in the Warranty of Charters he doth; yet Special Circumſtances may work the Contrary. And therefore 41 E. 3. 25. if the Vouchee enter with a Proteſtation of an eſpecial Eſtate in the Tenant, who admits it, the Vouchee ſhall Warrant no other Eſtate, though it be greater.

Co. L. 126. a.

So likewiſe if the Tenant prayeth Warranty of an Eſtate certain, and the Vouchee admits it, he ſhall make that Good, though the Eſtate in Truth be leſs; and therefore 38 E. 3. 9. 14. if one hold Land only for Term of his Life, and I Warrant the Land to him and his Heirs; if I ſhew this upon the Voucher, he ſhall recover but for Life: But if the Deed be entred, and I except not to it, Brook Recovery in Value, 8. I ſhall anſwer Fee-ſimple.

Co. L. 387. a.

Much more plainly here in the Principal Caſe, where the Declaration is expreſly upon a Fine, and Warranty in Fee-ſimple truly; upon which he Demands Judgment accordingly for a Warranty of Fee; ſo that if there were nothing elſe, this alone were Cauſe to barr this Action, ſince in Truth he hath but an Eſtate for Life. And yet if the Defendant ſhould yield to his Demand, he ſhould anſwer Fee-ſimple; and if Judgment ſhould have paſſed according to the Declaration in this Caſe, and Execution ſhould have been after ſued upon it, it had been then too late to have pleaded this, which he ſhould have pleaded before in the former Action, 21 H. 6. 41. and 22 H. 6. 22. F. Garr. Char. If a Diſſeiſor in an Action brought againſt him, Vouch, or make Requeſt to have a Plea miniſtred unto him, or bring a Writ of Warrantiæ Charta, and then after that the Diſſeiſee enter upon him and put him out, and he re-enter, ſo that he is in of another Eſtate, than was warranted, yet he ſhall Recover. But otherwiſe it would have been, if the Entry of the Diſſeiſee had been before the Voucher's Requeſt and Writ, for then the Vouchee, or Defendant might have ſhewed, that he had been in of another Eſtate at the Time of the Voucher and Writ. Out of which Caſe cited and allowed by F. Na. br. in this Writ de Warrantia Chartæ, I am clear of Opinion, that if a Man have Land conveyed unto him with Warranty, whereupon a Stranger hath Right to enter, and he bring his Writ of Warranty of Charters, and hath Judgment, though the Stranger after brings no Action but enters, he ſhall have his Execution; for a Voucher and Requeſt of Plea are required where they may be had: But in Caſe of Entry it may not be, and the Warranty is againſt all Eviction by Eign Title, either by Entry or by Action; which I note to warn Men how they proceed againſt an Ejectione firme, where no Voucher, nor Requeſt for Plea can be had; for if a Man, foreſeeing that his Title is Defenſible by Entry, bring this Writ of Warranty of Charters againſt his Feoffor, and hath

Deut. 4.

Judg-

Judgment, and if the Stranger, that hath right of Entry, ſeal this Leaſe, this Entry gives Cauſe of Recompence, but let him look that he bring his Action in time.

The next is, becauſe the Plaintiff and his Father, who is the laſt Rem. in Fee, and the reſt come in by Recovery in the Poſt, in which Caſe they can take no Benefit of the Warranty, which can be extended no further, than as it is limited, that is, either to the Parties or their Heirs or Aſſigns, and he that recovers is neither; but above that Eſtate, and where one comes under the Eſtate, yet if he be not in the per by him, to whom the Warranty was made, he is out of the Benefit. To the third Objection, *viz.* the doing it by Common Recovery. 2 Cro. 370. Co. L. 117.

And therefore, 22 Aſſ. 37. & 22 Aſſ. 69. If Tenant in Dower infeoff a Villain with Warranty, and die, and then the Lord enter and be impleaded, he cannot Vouch the Heir of Tenant in Dower; and if the Lord had entred before the Death of the Tenant in Dower, that made Warranty, and then ſhe had died, the Lord could not ſo much as Rebut the Heir. 3 Co. 62. a. 63. a. 5 Co. 17. a. 1 Co. 125. a. 3 Co. 63. b. 1 Cr. 371. Mod. 193.

But becauſe this is a Common Recovery, I will enlarge my ſelf a little in it for Learning's Sake and for Uſe, though it makes not directly for the Caſe. Mo. 71.

I am of Opinion, that if a Man convey Land to me and my Heirs with Warranty, and I make a Feoffment or levy a Fine, or ſuffer a Recovery without Vouching my Feoffor, to the Uſe of my ſelf and my Heirs, that yet I may Vouch my Feoffor, as I might do before, for this is my old Fee-ſimple, in the ſame Degrees and Privity in Effect, as before. Warrant. Chart. B. 24 Voucher 266. Dy. 12. p. 59. 35. p. 33. 143. p. 55. Aid. Br. 46. Kel. 32. b. 71. 122. b.

And therefore if I have Lands, that I hold in Knights Service, by Priority and Poſteriority, and do make one joint Feoffment of them to mine own Uſe, yet the Priority ſhall remain as before, according to the former priority, for it is actum agere, as it is holden in the Caſe of the Abbot of Bury, for the Wardſhip of the Heir of Bokenham, Dyer 28 8. fo. 11. A. 12. B. But this Caſe of priority is there cited, as a Caſe ruled between the Lord Roſs and the Lord Dacres, for the Wardſhip of the Heir of Conſtables, for it was holden that the New uſe and State was in Degree the ſame, as before. And ſo the Principal Caſe there is, and if I enfeoff I. S. to the Uſe of himſelf in Tail, the Remainder to mine own right Heirs, this is a Reverſion. Quo Warranto, B. 6. Redend, B. 17. Reſceit, B. 57. Alienation, B. 8. Deviſe, B. 8. Statute Merchant, B. 5. Tail, B. 32. Count Plea de Voucher 51. counterp. d'Aid, 7. Aſſets per B. 1. Apr. 280. 1 Co. 102. 13 Co. 5. b. Ap. 31, 53. Co. L. 23. a. 2 Ro. 37. Preſentation, B. 62. Waſt. Br. 112. Mo. 285. 1 Cr. 24. Dy. 287. p. 13. 259. p. 20. Co. L. 22. b. Livery, B. 61. Sever. Præcipes, B. 1.

This Point is clear in Caſe of a Recovery upon a Title, ſo it is alſo in Caſe of a State truly in the Poſt, as Tenant in Courteſie, Dower, Lord of a Villain, or by Eſcheat, but if one levy a Fine to me in Fee, with Warranty to me and my Heirs, and I ſuffer a Common Recovery againſt me to mine own Uſe, as before, my Warranty remains, for I am in by him, as I was in before, and if the Warranty were to me, my Heirs and Aſſigns, and I ſuffer the Recovery to the Uſe of a Stranger, he ſhall Vouch my Feoffor as my Aſſignee, for common Recovery is indeed an Aſſignment. To the 4th Point: Of ſuing *Osborn* in a Warr. Char. who had been Vouch once before. Mo. 859. Mod. 193.

As to the Point of vouching Osborn, or ſuing Warrantiæ of Charters againſt him, having formerly vouched him, and had Judgment and Recompence; it is clear he cannot have Recompence again, for the Warranty is executed, ſatisfied and ſerved in the firſt, as in a Scire Facias to execute a Fine, it is a Bar to plead, that it is executed already, and that the Demandant, or his Anceſtors, have been ſeiſed by Force of the Fine, 23 E. 3. F. Garr. 77. Expreſs. If I have recovered in Value, I ſhall never vouch again for thoſe Lands by Force of the firſt Warranty, becauſe it was once executed. And by the ſame Reaſon, if I once have had Judgment to have Value upon a Warranty, I ſhall not Vouch again upon the ſame Warranty for the ſame Land. Co. L. 393. a. 102. a.

And if you will Reply to me, that the Warranty in Queſtion is by Osborn and his Wife, and the former Voucher was of the Husband only; I Anſwer, that then it muſt be underſtood that they are two ſeveral Warranties, and then in vouching the Husband only he renounceth the Warranty of him and his Wife, as after ſhall be ſhewed; but it cannot be ſaid in this Caſe, that the Warranty by the Wife ſhould be Void, or ſo ſuppoſed, as in the Caſe 10 E. 3. 52. where Warranty upon a Leaſe being made to the Husband and the Wife, the Husband alone vouched over, and averred that the Wife had nothing, and therefore the Warranty was void unto her, which is alſo the Reaſon in the Judgment of the Caſe of Eare and Snow, Plow. 540. That the common Recovery againſt Tenant in Tail, and his Wife having nothing, ſhall bind the Tail. But where the Woman Warrants

rants on the Contrary Part, ſhe is bound though ſhe hath nothing; yet it is true, that to ſeveral Reſpects, a Warranty may receive ſeveral Satisfactions by Parcels, but not totally. And therefore, Hill. 5 Jac. Regis, Rot. 941. in the King's Bench, the Caſe was this; that one John Rudge did grant certain Lands in South-Molton in Com. Devon. unto John Pincombe, for his Life, in the Fifteenth Year of Elizabeth; and in the Thirtieth Year demiſed the ſame unto one William Hunt for 21 Years, to begin after the Death of the ſame John Pincombe, and after 32 Elizabeth, granted the Reverſion of theſe Lands unto Amy Pincombe and others for their Lives, with this expreſs Clauſe of Warranty following, "And the ſaid John Rudge and his Heirs, "all the Premiſſes unto the ſaid Amy, againſt all Perſons claiming by the "ſaid John, his Anceſtors or Heirs, ſhall and will Warrant, Acquit and "Defend, during the ſaid Term." John Pincombe atturned and died, Amy and the reſt entred, upon whom William Hunt the Leſſee entred, whereupon Amy and the reſt brought their Action of Covenant againſt John Rudge to the Damage of 200 Pounds: And the Defendant pleaded in Bar, that the Plaintiff had formerly brought a Warrantia Chartæ againſt him upon the ſaid Warranty for the ſame Land, and that it was yet hanging undetermined; and the Plaintiff demurred in Law, and it was adjudged for the Plaintiff, and upon a Writ of Error brought in the Exchequer Chamber, the former Judgment was affirmed; the Reaſon was, that though the Warranty was annexed to the Freehold, yet becauſe the Impeachment was only by a Leaſe for Years, for which there could neither be Voucher nor Warrantia Chartæ, nor if Judgment had been given in the Wartantia Chartæ, could any Execution be made in Value for ſuch a Leaſe, therefore it was holden as a Warranty real, if the Freehold were brought in Queſtion. But when a Leaſe for Years is in Queſtion, taken out of the Freehold, it is to be uſed as a Perſonal Covenant, and to be ſatisfied in Damages.

2 Saund. 180. Ante 3. Yelv. 139. 1 Roll. Rep. 25. 1 Roll. 353.

1 Saund. 180. accord.

Out of which Judgment it appears, that it was allowed by both Courts, that a Warranty of Charters will give remedy for a State of Freehold defeated by Entry; and that a Warranty may have a double Execution for ſeveral Eſtates, and that a Warranty of it ſelf real may be uſed as a Covenant to recover Damages: And by the ſame Reaſon, if a Man convey Lands in Fee with Warranty, and the Tenant bring a Warrantia Chartæ, and hath Judgment pro loco & Tempore, and then a Stranger Recovers an Eſtate for Term of Life, he ſhall ſue an Execution for Recompence for ſuch Eſtate; and if he die, and another recover another Eſtate for Life, he ſhall ſue another Execution for like Recompence, for his Recompence ſhall be according to his Loſs, as the Books before cited do prove; for he loſeth not the Land warranted, but ſome leſs Eſtates out of it, and ſo the Inheritance of the Warranty remains ſtill with the Inheritance of the Land. But if once a whole Fee-ſimple be recovered, and Recompence for it, then the Warranty is wholly executed and ſatisfied, and ſo extinct.

2 Ro. 810.

Co. L. 383.

This is true in Caſe of a Recovery and Voucher proper and Bona fide: But if the Caſe be for Example, that Tenant in Tail, the Remainder or Reverſion levie a Fine to me and my Heirs with Warranty, and then I ſuffer a Recovery to bar the Remainder, and Vouch the Tenant in Tail as I muſt, and ſo the Recovery paſſes with his ordinary Judgments, and after a Stranger ſues me for the Land upon Title; in that Caſe and the like I hold, that I may Vouch my Conuſor again, for the other is known in Law, and to the Court to be a feigned Recovery, and by Conſent, and to be but Part of the Aſſurance of the Land between the Parties, to bind the Remainder or ſuppoſed Remainders, and not in Execution of the true Intent of the Warranty: So there are Covenants for Recoveries with double or ſingle Voucher, and ſuch would be admitted though there were no Warranty at all.

But now of the other Point.

Point to the fifth, *viz.* of divers Warranties.

If the Osborn vouched in the common Recovery ſhall be underſtood another Osborn, and not the ſame Osborn, then it muſt be underſtood, that Rolle the Plaintiff had ſeveral Warranties againſt ſeveral Perſons, and then, when an Action was brought againſt him, he could not have Advantage of both, but muſt hold himſelf to one. And therefore 9 H. 5. 12. one brought a Scire

Scire Facias upon Fine, as Heir to two Parceners; the Tenant pleaded in Bar a Fine levied by the two Parceners with Warranty, and relied upon the Warranty, and the Plea was holden double, and he forced to rely upon the Warranty only of one. And ſo likewiſe 31 E. 3. Fitz. Voucher 25. If one have divers Warranties, and they fall by Deſcent upon a Perſon, Heir unto them both, yet he muſt be vouched only as Heir unto one, and the Reaſon is apparent (whether you regard the Demandant or the Vouchee) for as to the Demandant it is a kind of Plea in Bar, and therefore ought to be ſingle, for the Demandant may counter-plead the Poſſeſſion of the Vouchee and his Anceſtors, which they cannot do if they be divers.

And again, the Voucher of the Tenant againſt the Vouchee is a kind of Demand or Suit, and therefore ought to be ſingle, and the Vouchee may counter-plead the Lieu, which he cannot do, if they be divers. Hereof it followeth, that when he hath his Choice of Vouchers, and takes him to be one, and thereupon proceeds to Judgment, he loſeth the other and can never reſort to it again. As in Caſe of divers Pleas in Bar, where the Actions come to a Final Judgment upon one. But if a Man have divers Warranties for the ſame Lands, he may have ſeveral Writs of Warranty of Charters, and Judgment upon them; and ſo is Fitz. N. br. 135. I. and that may give him double Remedy, or not, as the Caſe may be. For if he be after ſued for that Land in an Action, wherein he may Vouch but one, then he can never take Advantage againſt the other, becauſe he did not Vouch him according to the former Rules. But if he ſued in an Action, wherein he cannot Vouch, but may require Plea, and he doth require Plea of them both, and they both adviſe one Plea, and he plead that, and loſe, he ſhall have ſeveral Recompence againſt either; but if they adviſe ſeveral Pleas, he can have no Recompence but againſt him, whoſe Plea he followed. But if the Land be not recovered againſt him by Action, but by Entry upon an Eigne Title, then he may ſue ſeveral Executions upon the ſeveral Judgments in the Writ of Warrantia Chartæ againſt either of them for full Recompence, and ſo he ſhall have double Value for his Loſs, for either of them warranted the whole, and neither of them hath Colour to pray Aid, or make Uſe of the Recompence, that the other hath yielded for his own Eaſe.

(13) Counden *verſus* Clerke.

GEorge Counden the Younger brought an Ejectione firmæ againſt Thomas Clerke of three Acres of Paſture in Newington, of the Demiſe of George Counden the Elder; upon an Iſſue of not Guilty, the Jury found a Special Verdict, that one William Counden was ſeiſed of the Land in Fee, and held them with others in Soccage, and had Iſſue one John Counden and Elizabeth Counden, and that the ſaid Elizabeth took to Husband one George Dalton, and had Iſſue by him Jane Dalton and Elizabeth Dalton, and died; and that William Counden made his Will, and gave thereby unto Jane and Elizabeth Dalton, to either of them Ten Pounds a Year, during their Lives, iſſuing out of certain Lands in Southwark, called the Woolſack Rents, and therein had this Clauſe.

Ejectione Sur. Hill. 10 Jac. Rot. 3315. Jenk Cent. 294. Winch Ent. 445. Mo. 860. Deviſe B. 1. 1 Ro. 839. 1 Brnl. 129. Deviſe to the Heir or Heirs of the Name of the Deviſor muſt find a very Heir. Of Deviſes and their Intents at large. This Caſe is in *Moor's* Reports fo. 860. and Judgment given for the Defendant, againſt the Brother of the Deviſor's Title.

" Item, As touching all my Lands in Southwark, and in Newington, Lam-
" beth, and Greenwich, whereof I now ſtand ſeiſed, which of right Will,
" and my only Intent and Meaning is, ſhall deſcend and come unto John
" Counden my Son, after my Deceaſe, this is my Deviſe." And then appoints, that certain Friends of his ſhall receive the Profits of them till his Son ſhall come to 24 Years, and then they to make an Account and ſatisfie him. And then adds this Clauſe, " Provided always, that if my
" Son John ſhall happen to deceaſe without Iſſue of his Body lawfully be-
" gotten, that then I will all and ſingular my ſaid Lands, Tenements
" and Hereditaments, and every Parcel thereof, ſhall go unto the right
" Heirs Males, and Poſterity of me and my Name for ever, equally to be
" divided unto and amongſt them, Part and Portion like. And that then,
" and in ſuch Caſe I will and bequeath unto Jane and Elizabeth Dalton, and
" to either of them, one Annuity or yearly Rent of 5 l. a Year a-piece more,
" iſſuing out of the Woolſack Rents, for Term of their Lives." Then the Deviſor

Judgment was in this Caſe given for Clerke, that is for the Grandchildren as Heirs in Default of the Will, becauſe the Deviſor's Brother could not take by it.

Deviſor dieth, and John Counden the Son dieth without Iſſue, then the two Grand-children, Jane and Elizabeth Dalton enter as Heirs, and make a Leaſe of the Lands in Queſtion to the Defendant Thomas Clerke, who enters, upon whom George Counden the Elder, being Brother of William Counden the Deviſor, of his Name and the whole Blood, entred; and made the Leaſe unto the Plaintiff, who entred, upon whom Clerke the Defendant re-entred. And if upon the whole Matter the Entry of George Counden the Elder upon Clerke the Defendant was Lawful, then they find for the Plaintiff, if not, for the Defendant.

1 Cr. 24.

I will make this Caſe three Queſtions.

1. 2 Cro. 416.

Whether the Limitation to the Heirs Males, &c. upon the dying of John Counden the Son without Iſſue, ſhall take Effect by way of Reverſion or Remainder, or elſe by way of original or expectant Deviſe. For upon that Point decided one Way, will fall a certain Conſequence.

2. The next Point is, whether the Limitation, if it were a Deed, could carry this Land to the Brother.

3. And the third is, whether it can carry the Land to the Brother in Caſe of Deviſe, as this is.

To the firſt.

And to the firſt, I am of Opinion, that the Son is by the Proviſo of this Will made Tenant in Tail to him and the Heirs of his Body. For the Implication (which in a Will is ſufficient for that Purpoſe) is plain. Hereof it will follow, that the Limitation, after following to the right Heirs Males, &c. will be but a Reverſion and will veſt alſo in the Son; for this is a poſitive Rule, that a Man cannot raiſe a Fee-ſimple to his own right Heirs by the Name of Heirs, as a Purchaſe, neither by Conveyance of Land, nor by Uſe, nor by Deviſe, 28 H. 8. The Caſe of the Abbot of Bury, &c. and the Lord Borough's Caſe, 35 H. 8. Dyer 54.

Cr. Car. 161.

C. L. 22. t. 1 Vent. 372. 2 Mod. R. 208.

1 Ro. 626. Cr. El. 833. b. 3 Cr. 833. Plo. 545. 1 Cr. 161. Dy. 354. a. Ro. 1. 626. Vaug 271. Dy. 124. a. Sty. 148, 149.

Nay more, 4 H. 6. If a Man deviſe Lands to a Perſon, that is next Heir, and his Heirs, the Deviſe is Void, and it works by Deſcent, Mich. 2. and 3. Phil. & Mar. Dyer 124. Debt againſt an Heir. The Defendant pleaded, that he had but the third Part of Twenty Acres by Deſcent, the Iſſue was, whether he had the whole, and it was found that the Obligor his Father deviſed the whole to his Wife, untill the Defendant his Son and Heir ſhould come unto the full Age of 24 Years, and from thenceforth to him and his Heirs, and Judgment was given for the Plaintiff. But it may be ſo limited unto Heirs entail, or to one by the Name of Heir ſingle in Tail, M. 4 & 5 Phil. & Mar. Dyer 156. the Caſe of Greſwold. He made a Feoffment to A. for Life, the Remainder unto the Heirs Males of the Body of the Feoffor, the Remainder to his own Heirs in Fee. The Father the Feoffor had two Sons, and the Elder had a Daughter and died, and it was adjudged for the Daughter againſt the Uncle, either becauſe the Entail to the Heirs Males was Void, or becauſe it ceaſed in the Elder Son. But P. 2 Eliz. Dyer 181. Fiſh levied a Fine to the Uſe of himſelf in Tail, and a Formedon brought upon it by the Iſſue. And the precedent Words touching the Deſcent of the Land to him changeth not the Caſe, for theſe Reaſons.

Co. L. 22. t. 1. And. 3 Co. L. 26. b. 220. a. 1 Cr. 24. 1 Ro. 841. 2 Ro. 415. 2 Le. 25. 1 Ro. 827. N. Benl. 49.

Reaſon 1.

Firſt, it is no expreſs Gift aſſertive, but a Report enunciative, thus touching my Land (which my Meaning is ſhall deſcend and come to my Son, this is my Will) and ſo proceeds to diſpoſe it to his Friends for a Time, and then chargeth them with the Rents, and then diſpoſeth of the Inheritance, ut infra, not agreeing in Appearance with the Deſcent.

Reaſon 2.

A ſecond Reaſon is, becauſe the Declaring that the Land ſhall deſcend to his Son is juſt the ſame that the Law ſpeaks, it is utterly Void and Idle, and then the reſt of the Deviſes muſt proceed, as if that had not been ſpoken at all, as the Caſes are before. This I deviſe, that if my Son die without Iſſue, then my Land ſhall go to my Heirs Males. And therefore the Caſe in 4 H. 6. & 2 & 3 Phil. & Mar. Dyer 124. before is ſtronger than this, where it is reſolved, that a Deviſe made to the Son and Heir and his Heirs is utterly Void, for then it is not to the Heirs collectivi, but to the Perſon that is Heir in Fee. And though the Limitation to the Heirs Males be ſpoken Con-

Conditionally by the Word, if John die without Iſſue, that is an ordinary Limitation of a Rem. as in a Fine ſi contingat, yet the Rem. or Reverſion, takes Place preſently.

A third Reaſon is, that that Part of the Will may take Effect in all the Words; and yet it may ſtand, as I take it, for the Words are, that the Land ſhall Deſcend and come to the Son, which is in all Parts true, for it ſhall come to him in Tail by the Deviſe, and the Reverſion by Deſcent. Reaſon 3.

Now if the Caſe ſhall be taken thus, then clearly if the Reverſion veſted in the Son in Fee, it muſt of Neceſſity Deſcend from him to the Daughters of his Siſter, and not to his Uncle.

To the ſecond Point, when the Limitation is made to the Heirs Males or Females, they, that will take, muſt have both Words verified in them, that they muſt be Heirs, and alſo Males or Females. But this hath a divers Conſideration, and upon divers Reaſons in Caſe of Deſcent, and in Caſe of Purchaſe, for the Word Heir is ſometimes taken Abſolutely, and as the Grecians call it ἁπλῶς or ſimpliciter, ſometime κατὰ τί, or ſecundum quid, or per accidens; ſometimes in Abſtracto ſtanding naked by it ſelf, and of it ſelf; and ſometimes in Concreto cloathed with Land or Rent, in reſpect of which he may be Heir, that is not right Heir, as the Word is here. For Example, the Younger Son in Borough Engliſh is Heir, and all the Sons in Gavelkind; whereof the Reaſon is, becauſe the Cuſtom is, and ſo muſt be pleaded, that the Cuſtom of theſe Lands is, that they muſt Deſcend to the Younger Son, or all the Sons, ſo they are Heirs ſecundum quid of thoſe Lands in point of Deſcent, or when they Deſcend, for then they are within the Cuſtom that gives the Inheritance: Tum demum ſcimus cum per cauſas ſcimus. But now make the Limitation, even of Land of that Nature, to Heirs not in Point of Deſcent, and it will be clearly otherwiſe. And therefore, if I give Land in Gavelkind, or Borough Engliſh, to one for Life, the Remainder to the Right Heirs of I. S. the True Heirs ſhall take it, for this is out of the Caſe of Cuſtom, and ſo muſt run to the Heir at the Common Law, 37 and 38 H. 8. B. Deſcents 59. & Don. 42. To the ſecond Point. Co. L. 176, a. 14. a. Co. L. 140. a. b. 10. a. 175. b. 1 Co. 102. b. 103. 101. a. Co. L. 10. a. Deſcent B. 59. Dy. 133. b.

Note alſo, that Warranties and Eſtopples do always Deſcend upon the Right Heirs general, as being to ſimple Heirs, 38. E. 3. 22. If there be a Warrantor, who hath Lands in Gavelkind, the Eldeſt Son ſhall be vouched alone; but the Tenant may alſo Vouch the others for the Poſſeſſion, 32 E. ff. Voucher 94. that the Heir general ſhall take ſuch Advantage of ſuch Warranty and no other, except he comes in as vouched for Poſſeſſion with the True Heir. Alſo Eſtopples fall upon the Heir at Common Law, and alſo the Daughter, that comes in by poſſeſſio fratris, ſhall eſcape an Eſtopple of the Father, 35 H. 6. 33. Br. Eſtopple 23. Co. 9. 97. 1 Inſt. 337. b. 12. a. 8 Co. 54. Mo. 114.

Nay more, if I convey Lands, that I have on the part of the Mother, or in Borough Engliſh to I. S. and his Heirs, without Conſideration, the Uſe ſhall be Void, and ſo the Land ſhall return again to me, and to my Heirs of the Mother, or in Borough Engliſh as before, for the Law doth conſtrue the Uſe of the ſame in State and Quality as the Land was. But if I do declare the Uſe to me and my Heirs, or upon ſuch Feoffment reſerve a Rent to me and my Heirs, it ſhall go to my Heirs at Common Law, for it is not within the Cuſtom, but it is a new Thing divided from the Land it ſelf, Trin. 4. and 5 Phil. and Mar. Dyer 162. and that is the Reaſon of another Difference, 9 H. 7. 24. Shellies Caſe, that Land by Deſcent falling upon one, ſhall be taken from him by a nearer Heir born. Not ſo of theſe Purchaſes. 1 Syd. 26. 13 Co. 56. Co. L. 13. a. 23. a. 1 Co. 100. b. 1 Cr. 24. 2 Ro. 780. 1 Co. 95. a. 99. a. Co. L. 169. a. b.

So it is in the Caſe of Entails, whereof the Statute of Weſtminſter 2. gives Cramples, which were Fee-ſimples Conditional at the Common Law, they take their Effect by that Statute in Caſes of Deſcent; but where they are not in Caſes of Deſcent, but the Limitation is immediately, and by way of Purchaſe to the Heir Male or Female of the Body, he muſt be as well Right Heir as Male or Female of the Body, that ſhall take, for this is clearly out of the Letter and Intent of the Statute of Weſtminſter, the Caſes of 37 H. 8. B. Noſme 1. and 40. Sir John Huſſey made a Feoffment in Fee to the Uſe of his Wife for Life, the Remainder to his own Heirs Males

of

of his Body, the Rem. to his Right Heirs after he was attainted of Treaſon. The Wife dies, Sir William Huiſſey prays an Ouſter le main, and Whorewood the King's Attorney was of Opinion, that he ſhould have it, comparing it to an Entail in Deſcent, and yet granted that the Rem. in Fee failed for Want of Heir, where it is clear by contrary Opinions there, and ſo in Shellies Caſe without Controverſie, that the Fee-ſimple veſted in Sir John Huiſſey, and ſo was by him forfeited, and that the Heir Male of the Body failed in Purchaſe, and ſo all came to the King.

1 Co. 103. a. b.

And this Caſe is yet more clear, for here the Heirs Males are not reſtrained to any Body, which might have had ſome Colour of Help from the Statute of Weſtm. But this muſt be a meer Fee-ſimple being without Body.

And again, if it had been to the Heirs Males of the Body of the Deviſor (as here it is to the right Heirs Males of the Name of the Deviſor) it could not have ſerved this Brother, being collateral, as it might have ſerved an Iſſue Male of himſelf, if this Deviſe ſhould be taken in Nature of a Deviſe to a Man, and his Heirs Males, in which the Body ſhall be underſtood, as I will ſhew you after in a Caſe of Deviſe.

To the third Point.

And to the third Point, whether this ſhall paſs by Deviſe, we muſt paſs between two main grounds, but ſo as we offend neither. One that the Deviſe muſt be taken according to the Intent of the Party Deviſor. The other, that ſuch Intent muſt be ſo expreſſed in the Will written, that it may be certain to the Court, and not againſt Law.

4 Co. 4. a. b. Co. 16. b. 17. a. b. 5 Co. 68. a. b.

2 Cr. 374. 5 Co. 68. b. 8 Co. 155. a.

Now we are in Caſe of Names and Nominations of Perſons, or Bodies Politick or Corporate, that may take, whereof there are divers Sorts, as firſt the Proper Names, or Sir Names, wherein notwithſtanding there may be Ambiguity, as if I deviſe Land to my Son John, having two of that Name, Averment, who was meant, ſhall make this certain.

There are alſo more Nominations or Deſcriptions, as by ſome Dignity, Office, or the like, as to deviſe Land to the Earl of Hertford, the Lord Treaſurer, or the like, and this will admit a Deſcription made good by Reputation, though not by Truth, as Land will paſs, even by Conveyance, to one by the Name of Son, which is a Baſtard, or by the Name of Wife, which is not Lawful, if they be ſo reputed, or known by that Name, 27 E. 3. 85. a. b. A Grant by an Abbot without any other Name, good, 10 H. 4. 5. So one may take by the Name of Son, or Daughter, if he be ſo known, although there were no Marriage between the Father and Mother, 1 E. 3. 19. 39 E. 3. 24. There are Names or Deſignations, that have an equivocal Amphibologie in them, as Puer for Male or Female, and yet if it be no way cleared by the Contrary, it will prima facie be taken for a Son, 16 Eliz. Dyer 337. make this the like of the Word Heir, Feaſt of St. Michael by Preheminence of the Archangel; I Grant, that if a Deviſe do ſufficiently and certainly ſhew the Intent of the Deviſor in the Subſtance, though the Circumſtances fail or be defective, I care not. I Deviſe Eccleſiæ Sanct. Andreæ in Holbourn, 21 R. 2. F. Deviſe 27. A Deviſe unto a College by a Name known, although it be not by the very Name of the Corporation, as to Trinity College in Cambridge, it is good, the Caſe of the Univerſity of Oxford, Co. lib. 10. 57. Note, by the Statute 1 Mar. Deviſes to Spiritual Corporations enabled M 8. & 9 Eliz. Dyer 255. A Deviſe to my Son, after the Death of my Wife, give an Eſtate to my Wife, 13 H. 7. 17. & 29 H. 8. B. Deviſe 48. 2 Cro. 75. 1 Roll. 843, 428, 429. Plowd. Com. 521. a. Moore, 853. Plo. 158, a. 414, a.

1 Inſt. 3. b.

Co. L. 3. a. 6 Co. 65. a. 66. a. 6 Co. 65. a.

Mo. 104. 6 Co. 65. a. 66. a. Co. L. 73. a. 189. a.

6 Co. 19. b. 20. a. Ap. 65. 10 Co. 57. b. Plo. 523, b. 345. a. 3 Cr. 90. Br. Corporation, 77.

2 Le. 65.

1 Ro. 843. Mo. 853. 2 Cr. 75. Swinb. 109. Vaug. 264. 5, 6, 7. Mo. 635. Plo. 521. a. Sand. 186.

It ſince the Statute a Man Deviſe that his Feoffees ſhall convey the Land to A. and his Heirs, this is an Immediate Deviſe of the Land, 29 H. 8. B. Deviſe 48. Quære if the Land were never in Feoffment.

If I Deviſe Lands to one and his Heirs Males, without ſaying of his Body, the Law makes it an Entail (by the apparent Intent) to him, and to the Heirs Males of his Body, 27 H. 8. 27. by Fitz. and Shelley, clearly.

Co. L. 27. t. 1 Cr. 24. 1 Le. 257. 6 Co. 16. b. 17. a.

Therefore I hold the Book, 28 H. 6. Fitz. Deviſe 18. and Babington's Opinion, H. 6. 10. 13. to be no Law; which are thus, that if a Man Deviſe Land

Co. L. 25. t. Plo. 414. b.

Land to J. S. and his Heirs Males, and he have Issue a Daughter, and that Daughter have Issue a Son, that Son shall inherit by force of that Devise as an Heir Male, which cannot be, for it is oppositum in objecto to say, that there should be an Entail to Heirs Males of a Body (as clearly it is) and yet that an Issue by a Female should inherit, for that were to make it a Fee-simple, and where shall the Land rest in the Mean Time, while the Mother lives, and before the Son is Born? and what Warrant is there, when the Devisor speaks sensibly and certainly, to enlarge his Gift for ought appeareth beyond his Meaning, which is as great an Injury, as to abridge his Meaning. I would rather grant, that if a Man devise Land to J. S. for Life, the Remainder to the next Heir Male of J. D. and die; J. D. having Issue a Daughter, who had Issue a Son, and then the Daughter of J. D. die, and then J. D. himself die, and then the Tenant for Life die, that the Son of the Daughter of J. D. shall have the Land. 2 Cro. 656. Co. L. 25. b.

The Case 30 Ass. 47. & 30 E. 3. 27. where one, having two Sons and a Daughter, devised it to a Stranger for Life, the Remainder propinquioribus de sanguine puer. of the Devisor and died, his Sons having no Children, but his Daughter having two Daughters, and it is holden that neither the Sons nor the Daughter can take, for they are pueri, and not de sanguine puerorum, but the two Daughters of the Daughter shall take for their Lives, and if there were also Sons of Sons, or Daughters, they should all take together. And that Children born after the Remainder vested (which was after the Death of the Testator) should take nothing, and that the nearest of Degree in Blood should take, and the Worthiest in Order of Descent; for the Words here do import no Respect of Dignity, but of Proximity of Blood. But a Devise made in Remainder to a Corporation where there is no such is void, though there be such a Corporation made before the Remainder fall. otherwise, if the Corporation be begun, but no Head yet chose Aid 33. 9 H. 6. 23. & 49 E. 3. Ben. 106, 107. Co. L. 10. b. 6 Co. 17 a. Dy. 304. a. Co. L. 3. b. 2 Co. 51. b. 10. 31. b. Mo. 104. Co. L. 264. a.

So by Keble 2 H. 7. 13. If I devise Lands in Remainder to the Heirs of J. S. it is void, if there be no such J. S. though there be one, and Heirs of him before the Remainder fall, 19 H. 8. 8. If I devise Land to the Abbot of S. Peter, where it is S. Paul, the Devise is void. 9 H. 6. 23. 11 H. 6. 12. Farrington and Daylyes Case. One seised of Land devised it to A. for Life, the Remainder unto B. in Tail, the Remainder unto the next Heir Male of the Devisor, and the Heirs Males of his Body, the Devisor dieth, B. dieth without Issue, the next Heir of the Devisor was a Daughter. The clear Opinion of the Case is, that the Daughter shall have the Land by Way of Reversion, and though she have a Son after he shall not take away the Land. Chapman's Case, if Land be devised to a Stock, or Family, or House it shall be understood of the Heir principal of the House, much more where the proper Word of Heir is expressed; where the Case is doubtful the Law shall prevail as Mich. 15 & 16 Eliz. Dyer 326. One Huntly having Land demiseth the same for Years, rendring a Rent, and after having a Son and a Daughter, deviseth the Reversion to them, and to the Heirs of their Bodies, and for Default of Issue of the Brother and Sister, the Remainder to the right Heirs of the Devisor, the Brother dies without Issue, the Sister hath Issue and dies: It was adjudged that the Moiety of the Reversion and Rent should return to the Heir of the Devisor, yet the Implication may be so express, that it shall change the Law, as Mich. 13 and 14 Eliz. Dyer 303. One having Lands Wills that a third Part shall go to his eldest Son, and the other two Parts to four younger Sons, and the Heirs Males of their Bodies. And if a Child be born, he shall be Heir, and if all the five happen to die without Issue Male of their or any of their Bodies, then he willed that the other two Parts should revert to the Heirs of the Devisor. All the Sons but one die; The Opinion was, that the Survivor had an Estate Tail in all the five Parts, and nothing should revert as yet. Co. L. 73. a. 189. a. Co. L. 183 b. 5 Co. 8. a. 5 Co. 7. b. 8. a. b. 2 Cr. 656.

No Man shall shew me a Case in Law, whereby purchase by Devise to an Heir any may take, that is not Heir indeed 4 Co. 4. b. without Declaration plain.

And Hill. 5 Eliz. Dyer 220. One having Land Part in Fee-simple and Part in Fee-tail, reciting by his Will that his Wife was dowable of the third Part of all his Lands, deviseth unto her the third Part of all his Lands, yet

ſhe ſhall have but the third Part of the Fee-ſimple: But if it had been, I give unto her ſo much of my Lands, as ſhall amount unto a full third Part of all my Lands, it had been otherwiſe; ſo here, I grant, that though this Deviſe will carry it but to the very Heir, becauſe no other Senſe appears to the Court, yet if I ſay by my Will, I make J: S. my Heir, and I give unto my ſaid Heir my Land, and indeed he is not ſo much as of my Blood, or (as it is here) I give to my Heir Male, which is my Brother George Counden; or if a Man have an Houſe or Land in Borough-English, and buy Lands lying within it, and then by his Will gives his new purchaſed Lands to his Heir of his Houſe, and Land in Borough-Engliſh, for the more commodious Uſe of it, it will be otherwiſe, for here is hæres factitius or factus not natus or legitimus: So the Intent is certain, and not conjectural.

Latch. 9. apr. 75. Plo. 345. b.

2 Cr. 263, 448, 656. 646.

And that is the Reaſon of the Caſe of 7 E. 6. where Land is deviſed to three Brethren in Tail, and that one ſhould be Heir to the other, this makes croſs Remainders.

Will unſenſible or repugnant is void.

Now the Clauſe, that the Land ſhall be to the Heirs Males Part and Part like, makes it yet more repugnant and inſenſible; for if the Heir be preferred, that ſhould be an Intail, and then none can part with him. And if he meant that all, that were Males of the Name and Poſterity ſhould take togethe, then the Word Heir is wiped out, and then the Sons ſhall take equally with their Father, like the Caſe of 30 Aſſ. (before) of proximioribus de ſanguine, and therefore ſince the Will is unſenſible, repugnant in it ſelf, and of no Certainty, it ſhall be void in Law.

Derby, Aſhenhurſt and Curtis.

Laſtly, Aſhenhurſt's Caſe is even the ſame, judged in the Kings Bench, Term. Sancti Mich. Anno Jac. Reg. 7. Rot. 115. which was thus; William Beard ſeiſed in Fee of a Meſſuage called Beard-Hall with the Appurtenances in Beard in Com. Derby held in Soccage, having Iſſue three Daughters Elizabeth Emme, and Katharine, deviſed, the ſame after his Deceaſe to Emme his Wife for Term of her Life, and after her Deceaſe that his Executors ſhould receive the Profits thereof, until the full Sum of nine hundred Pounds was received, for the Preferment of his Daughters in Marriage over and above all Charges, and after the nine hundred Pounds levied, the ſaid Meſſuage ſhould remain to his right Heirs Males for ever. And if his Heirs Males ſhould diſturb his Executors in receiving the Profits, that then their Eſtates ſhould ceaſe, and the Land ſhould be divided among the Daughters then living, and died; One William Beard was found his Heir Male, Emme his Wife entred and died, Elizabeth his Daughter after his Deceaſe married Ralph Aſhenhurſt the Defendant, and had Iſſue Randolf Aſhenhurſt: And Francis Curtis the Plaintiff, by a Leaſe from William Beard the Heir Male, brought his Action of Ejectione firme againſt Ralph Aſhenhurſt, whereupon the ſpecial Verdict was found ut ſupra, And concluded that if William Beard took Eſtate by the Will in Remainder then pro Quer', otherwiſe pro defend. And upon Argument the Judges gave Judgment againſt the Plaintiff.

Judgment.

But Note, that upon that Judgment a Writ of Error was brought in the Exchequer Chamber; And this Judgment of Coundens being thus urged to maintain the other, there was much Labour to make Differences, but in the End Paſche 17 Jac. the Judgment was affirmed.

Ro. 1 R. 397.

(39) Elias Tiſdale *verſus Sir* William Eſſex

Brownl. 1 R. 23. Winch. Ent. 119, 120.

Covenant.

Plo. 140. a. 1 Roll. 430, 847, 269. b. 274. a. Mo. 207. Mo. 861. meſme Caſe. Vaugh. 120. Bulſt. 3. R. f. 204. 1 Ro. 397. p. 23. Cr. Car. 207. Condition B. 141. Cr. Car. 172. Cr. Jac. 92.

Elias Tiſdale brought an Action of Covenant againſt Sir William Eſſex a Baronet, and declared that it was agreed between them, by a Bill of Articles indented, in Manner and Form following: Firſt, the ſaid Sir William Eſſex convenit, promiſit & agreavit ad & cum præfato Elia, quod ipſe idem Elias haberet, occuparet & gauderet, certain Lands for ſeven Years from the Feaſt of the Annunciation next enſuing the Date of the Bill, and covenanted, that he ſhould quietly remove ſuch Buildings, as he ſhould ſet up at

at any Time within three Months after the Time, and that he would make him as good and perfect Demiſe of the Premiſſes, or Security for the quiet Enjoying of it, as his Counſel ſhould think fit, and the Plaintiff covenanted, that he would pay him 220 Pounds a Year for it during the Term, and that he would deliver up the quiet Poſſeſſion of the Land to Sir William Eſſex at the End of the Term. And declared that he entred into the Lands the next Day after our Lady-Day, and that one Henry Elſing entred upon him and ejected him, and hath held him out ever ſince; which he lays to be the Breach of his Covenant to his Damage of one thouſand Pounds, and produced in Court his Bill of Articles, dated in Febr. 10 Jacobi, whereupon the Defendant did demur in Law, and the Queſtions were made two.

2 Cr. 172. Plo. 131. b 132. b. 134 a. The Caſe here is, A. by Articles convenit, &c. that B. ſhall enjoy Lands for 7 Years, B. is put out by wrong.

The firſt, Whether this were a naked Covenant, or amounted to a Leaſe of the Land.

The ſecond, Whether the Ejectment by Elſing, being taken to be by Wrong, becauſe no Title was laid in him (and the Worſt ſhall be taken againſt the Pleader) ſhall be adjudged a Breach of Covenant in this Caſe. And it was adjudged that this was a Leaſe of the Land for 7 Years; for the Words haberet occuparet & gauderet the Lands, are the perfect Words to give Intereſt. And therefore 5 H. 7. 1. a Licence to occupy is a Leaſe, though 10 E. 4. ſeemeth to make a Doubt, that the Leſſor may alſo occupy with him: But 21 H. 6. 37. Paſton's Opinion I allow, that if one licence me to ſow his Land, that is no Leaſe: And therefore if I ſow the Land, the Owner ſhall reap it. Alſo 3 & 4. Phil. & Mar. Dyer. 150. One made a Leaſe to another for Life, & proviſum eſt, that if the Leſſee die within ſixty Years, that then his Executors and Aſſigns ſhould enjoy the Land in his Right for ſo many Years, as ſhould be behind of the 60 from the Date of the Leaſe. And the Opinion of the Court was, that it was but a Covenant. But here is a certain Term from the Beginning, and certain Rents and Covenants on both ſides, importing preſent Poſſeſſion of the Land, and the Covenant following is but in majorem cautelam, that he might require better Aſſurance by Fine or the like, or collateral Security. And the Word convenit in this Caſe ſounds not properly in Covenant, but in Agreement. And ſo 1 E. 6. and 37 H. 8. Broo. Leaſes 60. convenit & conceſſit to one that he ſhould have my Land is a Leaſe. And yet in that Caſe conceſſit is not ſo much a Grant, as an Agreement.

Cr. Car. 5.

Plo. 134. a. 140. a. Br. Licence 19. Plo. 154. a. 542. a. Jones. 231. 1 Cro. 207. Mo. 861. 3 Cro 486. 2 Cro. 92, 172. 2 Cro. 17. 1 Rol. 847. 848. 7 Kitch. 164. Co. L. 45. b. Bridgm. 13. 3 Leo. 22. Benl. 104.

Plo. 134. a. 132. b. 1 Co. 155. a. 1 And. 191. 381. 1 Ro. 518. 848. Mo. 480.

2 Cro. 207. Plo. 134. a. Dy. 272. b. 1 Cro. 207. 1 Ro. 847.

To the ſecond Point, it was adjudged no Breach of Covenant; yet it was agreed, as the Books are, 20 H 7. 12. & 46 E. 3. 5. If the Leſſor eject his Leſſee, he may have an Action of Covenant; and 12 H. 4. 3. If a Parſon make a Leaſe for Years, and then reſign, it is a Breach of Covenant, but the Law ſhall never judge, that I covenant againſt the Wrongful Act of Strangers, except my Covenant expreſs to that Purpoſe; for the Law it ſelf doth defend every Man againſt Wrong, and therefore 26 H. 8. 3. If I warrant Land unto you expreſly, yet I ſhall not defend againſt tortious Entries: But Mich. 15 and 16 Eliz. Dier 328. an expreſs Aſſumpſit, that the Leſſee ſhall enjoy quiete & pacifice abſq; interruptione alicujus, will bind me againſt Wrongs; and Hill. 33 Eliz. Wilſon and Foſter brought an Action of Covenant againſt Leonard Mapes in the King's Bench, and the Caſe was thus, that Mapes had leaſed unto them the Parſonage of Brankeſter for a Year, and covenanted to ſave them harmleſs concerning the Premiſſes, and the Profits of the ſame to be received for that Year againſt one Blunk, Parſon of Brankeſter, and they alledged that Blunk the Parſon had ejected them within the Year: And though that were taken by the Court to be a Wrongful Ejectment; for though he were Parſon, yet there might be many Ways to make his Ejectment Wrongful, and the Worſt ſhall be taken againſt the Pleader, yet it was adjudged that the Covenant was broken for two Reaſons; One, that it was to ſave harmleſs for the Receipt of the Profits, the other againſt a Perſon certain; both which did import that they ſhould receive no Harm by that Parſon touching the Profits.

Covenant that the Leſſee ſhall enjoy bindeth not againſt wrongful Ejectment. Dy. 57. a. 257. b. ant. 12. 4 Co. 80. b. 9 Co. 61. a. Cr. El. 214. 2 Cr. 215. Winch. 25. Yelv. 139. 30, 175. 2 Saund. 178. Pop. 143. 3 Lev. 71. Jones 360, 362. 1 Cro. 5. 1 Saund. 178. 8 Co. 133. b. Br. covenant 7, 20, 38. 48 E. 3. 2. a. 1 Leo. 29. 3 Leo. 44. Vaugh. 120. 2 Cr. 315. 3 Cro. 212. 13. Vaugh. 127. 1 Rol. 430. Lev. 1 R. 324. Mo. 175. Co. L. 384. a. Dy. 30. Cr. Jac. 383, 425, 444. Ow. 100. 1 Ro. 430. Vaugh. 27, 127.

(40) Harrington *verſus* Deane.

Termino S. Hill. Anno 10 Jac. Reg. Rot. 3230.

1 Roll. 120. Brownl. 1 R. 26. Account. Goldsborough London. Account. Receipt. By By whoſe hands, and to whoſe uſe. 11 Co. 38. a. Plo. 92. b. 41 E. 3. 10. a. Co. L. 172. a. Meſne Ca. V. *Moor.* 862. It was adjudged in this Caſe, *&c.* that the Defendant ſhould account in that for the Money received of Mr. *S.* becauſe he had a Warrant to receive the Money of Sr. *John Rotheram*, and Sir *John Rotheram* was bound to *M. S.* for it.

THomas Harrington brought an Action of Account againſt John Deane, to render him an Account of two hundred Pounds of Money, received by the Hand of Sir John Rotheram Knight, &c. The Defendant pleaded that he was never his Receiver of any ſuch Sum or any Part thereof, by the Hands of the ſaid Sir John Rotheram.

"The Jury find that the ſaid Sir John Rotheram was indebted unto Harrington in two hundred Pounds, and that Harrington willed Deane to require and receive the Money of Rotheram for him, whereupon Rotheram prayed Deane to borrow two hundred Pounds for him of any Body, and to pay it over from him unto Harrington, and he accordingly borrowed two hundred Pounds of one Mrs. Stanhop for Rotheram, and received it of her to pay over unto Harrington, and he appointed his Wife accordingly to pay it over unto Harrington, and Rotheram gave Bond to Mrs. Stanhope for it. And if upon the whole Matter, &c. And it was adjudged una voce, that the Action was well brought, and that the Verdict did maintain it, in ſort as it was laid, for it appears plainly from the Beginning to the End of the Caſe, that Deane the Defendant was made, and took upon him to be Servant as well to Harrington, to ask and receive two hundred Pounds, as to Rotheram, to borrow, where he could, two hundred Pounds, and that not only to the Intent, to paſs it over unto Harrington, but with an expreſs Commiſſion to pay it over indeed. Both which Commiſſions he did accordingly execute in all the Parts, ſo that though it appear not that Mrs. Stanhop lent the Money, to be paid over unto Harrington, yet it is found that Deane received it, as lent to Rotherham, whereby it became Rotheram's Money, the rather when he had given Bond for it; and that the ſame Receipt was to pay over unto Harrington, by Force of the firſt Commiſſion received from Rotheram and the Intention of Deane himſelf.

Commiſſion works upon that, that was not then in being.

So as in the ſame Inſtant it became firſt Rotheram's Money and by him as it was delivered over unto Deane to be paid unto Harrington for his Debt, (though it never came to Rotheram's own Hand actually) And ſo it became Harrington's Money received by the Hands of Rotheram, according to the Declaration.

Ap. 206. Yelv. 24, 164. 4 N. B. 138. a. Dy. 20.

And though the Books of 1 E. 5. and other Books be, that if A. deliver Money over to B. to deliver and pay over to C. that in this Caſe B. is anſwerable to two Actions of Account conditionally as the Books are, yet as this Caſe is, Rotheram could never have had an Action of Account againſt Deane for his Money, becauſe he had put himſelf out of the Property of it,

Dy. 49. a. Cr. Jac. 684.

by appointing Deane to pay it over unto Harrington for his Debt, and Harrington had accepted it, and made it his Satisfaction by appointing Deane to receive it by the Hands of Rotheram, and Deane had received it to that Intent, and in Execution of all Parts of that Agreement, and ſo all Parties were bound by it.

(41) Drury *verſus* Kent. Q. Imped.

Prohibition of Waſte in a Quare Imped. by the Plaintiff. Co. L. 67. a. 11 Co. 49. a. b. N. B. 49. i. 11 Co. 98. b. N. B. 6. 9. 2 Ro. 813

DRury brought a Quare Imped. againſt Kent the Incumbent and others; and upon Surmiſe made to the Court, that Kent did fell Timber upon the Glebe, and upon the Lands of Coppyholders, holding of a Manor Parcel of the Rectory, the Court granted a Prohibition.

(42) Pine *againſt the Counteſs of* Leiceſter. Debt.

Hugh Pine of Lincolns Inn brought an Action of Debt in the County of . againſt the Counteſs of Leiceſter, and declares that the Earl " of Leiceſter being ſeiſed in fee of the Manor of Cleobury in the County of " Salop granted a Rent Charge of 100 Pounds per annum, out of the Manor, " unto one Foſter and his Wife for their Lives, and then lays the Death of " the Lord of Leiceſter, and how the Manor came to my Lady, and then the " Death of Foſter and his Wife laſt: And now he as Executor to Foſter and " his Wife brought this Action for Arrearages of Rent incurred in their Life, " while the Manor was in the Hands of the Lady, and this Action being " laid in a County, where it was ſuppoſed Pine was ſtrong; it was moved to be laid in a more indifferent Shire: Whereupon I ſaid, that they were not well adviſed; for this kind of Action of Debt was local, and muſt needs be laid where the Land was, becauſe the Lady was not chargeable, but in reſpect of the Poſſeſſion, whereupon Serjeant Harris being not of Counſel in this Caſe, confeſſed it had been ſo adjudged in another Caſe.

Debt for Arrearages of Rent is ſtill local. Co. L. 162. a. 4 Co. 49. b. Winch. 69. Latch. 197.

1 Saund. 238. accord. 1 Cro. 143. accord. 184, 104, 168. 7 Co. 2. b. 1 Cro. 183.

(43) Cumberland *verſus* Cumberland.

The Earl of Cumberland brought an Action of Waſte againſt the Counteſs of Cumberland Dowager, and laid the Waſte in the Writ among other Things in the Caſtle of Burgeham (but did no otherwiſe aſſign any Town where the Caſtle ſtood) and other Waſts in the Towns of Burgeham, Flaxbridge, and Appleby, and then in his Declaration aſſigned Waſte in the Places and Towns mentioned in the Writ, and one other Town called Langton, not contained in the Writ, whereupon 18 ſeveral Iſſues were joined, whereof one was concerning the Reparation of the Caſtle of Burgeham, and none concerning any Thing of Flaxbridge. And there was one ven. fac. for the Trial of all theſe Iſſues, which did ariſe from the Towns of Burgeham, Appleby, and Flaxbridge, whereupon after Trial of theſe Iſſues, whereof 14 were found for the Counteſs, and four for the Earl, and Motion made in Arreſt of Judgment for Mis-Trial by the Counſel of the Defendant. It was reſolved by the Court, though they were all ſeveral Iſſues, and might be tried by ſeveral ven. fac. and then every ven fac. ſhould have come from the Place, where the particular Iſſue did ariſe, yet in ſuch Caſes as this, one ven. fac. was allowed to try them all for avoiding of Multiplicity, but then that ven. fac. muſt ariſe from all the Places, from whence all the Iſſues do ariſe, and from no more, as a Common ven. fac. for one Iſſue ought to be: Now here the ven. fac. offended in both theſe; for the ven. fac. did not come inter alia de vicineto caſtri de Burgeham, for a Caſtle will bear Avenue but from the Town of Burgeham, as if it muſt be underſtood to be in the Town, which is not ſo, though a Pariſh Church ſhall be intended within the Pariſh.

2 Ro. 667. Mo. 862. Waſte by the Earl againſt the Counteſs of Cumberland venire fac. amiſſe. 6 Co. 14 5 Co. 36. b. Yel. 26. 77, 178, 182. 2 Cr. 8. ap. 284. Yel. 187.

2 Cro. 86. 3 Cro. 114, 836. 2 Cro. 550. 3 Cr. 866. poſt, 64. Mo. 862. 2 Cr. 289. 1 Cro. 491. Co. L. 125. b. 2 Cro 239. 2 Roll. 618.

The other Fault was, that the ven. fac. was awarded from one Town inter alia, from whence no Iſſue did ariſe, which alſo was not allowable; whereunto the Plaintiffs Counſel gave theſe Anſwers, that this ven. fac. though it were but one in facto, yet in the Law and Effect it was as ſeveral, and then it might be void and avoided for one Iſſue, and yet ſtand good for other Iſſues, wherein thoſe Faults were not. And the rather as this Caſe was, becauſe theſe Faults of the ven. fac. were concerning theſe Iſſues only, that were found for the Defendant, and ſhe ſhould not be received to aſſign Fault or Error in that made for her. Whereunto it was anſwered by the Court, that the ven. fac. being one indeed, could not be made good in Part, and void in Part, and eſpecially where a Town was added to the ven. facias, which could not be applied more to one Iſſue, than to another, and therefore was vicious to all, and being the Fault of the Court, was to be diſallowed by them ex officio, though the Defendant ſaid nothing.

F. N. B. 21 F. 2 Saund. 46. 1 Cr. 204, 435. 5 Co. 55. b. 47. 8 Co. 59. 5 Co. 39. 2 Cr. 86.

The

Variance between the writ original, and the Declaration. 1 Cro. 272, 281, 282. Jones 304.

The other Fault was, that the aſſigning of Waſte in the Declaration in a Town not mentioned in the Writ, was a Variance from the Original, and a Fault uncurable to the whole Writ, and the Fault in the Declaration remains, and is to be pleaded in the Abatement of the Writ, whereupon Judgment was given qd. caſſetur Bre. and the Plaintiff reſolved to take a new Writ, and begin again.

(44) Cope *verſus* Lewyn. Aſſumpſit.

Tr. 12 Jac. Rot. 1704. Letters of Adminiſtration not produced. Brownl. R. 9 Winch. 19. 20 H. 6. 1. a. 10 Co. 94. b. 6 Co. 38. a. 2 Cro. 409. accord. Po. 218. Yel. 201. Plo. 467. 52. a. 57. a. 149. a. 8 Co. 88. a. 9 Co. 24. b. 1 Bulſt. 200. 25. a. 2 Cro. 299, 412, 360. Dy. 135. Plo. 277. a. 276. 9 Co. 41, 38. a. poſt 233. accord. Yelv. 33. 3 Le. 551, 592. Co. L. 225. a. Sid. 98, 249. 5 Co. 31. b. 2 Cro. 360, 361, 409, 412, poſt 272. 16 17 Car. 2. cap. 8. poſt 264. Godb. 33. poſt 218. 11 H. 6. 17. a. 9 H. 6. 11. b. 20 H. 6. 4. b. 5 Co. 31. b. Ap. 272. Yel. 33. Plo. 292. a. 285. b. 8 E. 4. 7. 1 Inſt. 124. a. Executor brings Actions of Eſcape not ſhewing the Teſtament.

COpe brought an Aſſumpſit againſt Lewyn, and declared upon a Promiſe made to the Inteſtate, and then layeth the Death of the Inteſtate, and that the Adminiſtration of his Goods was committed to him by the Biſhop, &c. All well, ſaving that he did not ſay, that he produced his Letters of Adminiſtration in Court: Upon Iſſue non Aſſumpſit, it was found for the Plaintiff, and upon Motion of Hutton in Arreſt of Judgment, the Court was of Opinion, that the Plaintiff could not have Judgment, for it is of the Subſtance of the Action that he be a ſufficient Adminiſtrator, and though he hath pleaded it ſo, yet he muſt ſhew it to the Court, that it may appear to them that it is as he hath pleaded, as upon a Plea upon a Deed, the Deed muſt be ſhewed in Court: And the Defendant may deny the Committing of the Adminiſtration, notwithſtanding that he hath Letters. Yet Serjeant Harris produced a Preſident out of the Kings Bench, Trin. 12 Jac. where one Barret brought an Action upon the Caſe againſt one Winchcombe, Sheriff of Oxfordſhire, and declared, that whereas upon an Action of Debt brought by him as Executor to one Lancelot Barret againſt one Long the Defendant, the Defendant had him in Cuſtody upon a capias utlegatum, and ſuffered him to eſcape notwithſtanding the exception, Judgment was given for the Plaintiff. But that differs from the former, for the Eſcape was a Wrong done to the Executor himſelf, though it be true that the Damages to be recovered ſhall be Aſſets in his Hands; for ſo ſhall they be in all poſſeſſory Treſpaſſes, and alſo the Producing of his Letters in his firſt Action is ſomewhat.

(45) John Jon's *Caſe.*

Court of Wards.

Out of the Court of Wards came this Caſe unto us.

Lincoln. Repugnancy in Office makes it void.

UPon a Mandamus after the Death of John Jon, it was found that die obitus ſui he was ſeiſed in Dom. ſuo ut de fœdo of the Manor, called Sutton's Manor in Barrow. And that he being ſo ſeiſed poſtea ſcilicet 10 Martii 42 Eliz. did therefore infeoff one Winchcombe to the Uſe of himſelf for Life, the Remainder to Welcome in Fee, and then concludes quod præd. John Jon ſic de omnibus dict. præmiſſis modo & forma ſupradictis ſeiſitus exiſtens de tali ſtatu ſuo de eiſdem obiit ſic inde ſeiſitus 12 Martii 8 Jac. And my Lord chief Baron and I ruled this Office to be void for the Repugnancy of the finding of the Eſtate, whereof he died ſeiſed, and ſo ordered a new Office to be found.

(46) Dawtries *Caſe.* Wards.

Melius inquirend. not ſhewing the Warrant of the firſt Office.

AND another Caſe was this. An Office was found by Commiſſioners after the Death of William Dawtry Eſquire, at Chicheſter, whereupon a Melius Inquirend. went forth and recited, but thus, Cum per quandam inquiſitionem captam Chicheſter compertum exiſtit, &c. And doth not ſay that it was either by Commiſſion or Writ, or before whom; whereupon we held it void, and the Office that was taken upon the Melius Inquirend. For by the Melius it muſt appear, that the firſt Office was by Warrant. But if it had been virtute commiſſionis, or de mandato noſtro, which is underſtood by Writ, it would have been good enough, although it had not been ſaid before whom, for ſo the Preſidents are uſual.

(47) Cowper *verſus* Andrews. Prohibition.

OKenden Cowper brings a Prohibition againſt Roger Andrews, Vicar of Cowfield, that whereas Thomas Lord de la Ware was hereforeze ſeiſed in Fee of 140 Acres of Land in Cowfield, late Parcel of an Ancient Park called Ewhurſt Park, lately impaled and repleniſhed with Deer, and ſo ſeiſed, he and all thoſe, whoſe Eſtate he had in the ſame 140 Acres, and all the Farmers and Occupiers thereof have uſed Time out of Mind to pay the Vicar of Cowfield foz the Time being two Shillings a Year, and one Shoulder of every third Deer, that within the ſame Park ſhould be killed, in full Satisfaction of al Tithes, renewing upon the ſame 140 Acres, which the Vicars have always accepted in Diſcharge of all Tithes: And then deduceth down the 140 Acres to himſelf, and then ſhews, that though he tendzed the two Shillings by the Year in ſuch Years; and though in the ſame there were no Deer killed, yet the Defendant refuſed to receive the ſame two Shillings beforementioned to be tendzed, and ſues him foz Tithes in Kind for thoſe Years.

Mich. 10 Jac. Rot. 1223. Suſſex. *Modus decimandi* for a Park, two Shillings a Year, and a Shoulder of every third Deer killed in the Park, which is now diſparked. Brnt, 31. Winch. Entr. 609. Godb. 237. Ro. 1. R. 120. Winch 46. Hutt. 57, 58. Moor 863. Apr. 297. Diſmes Br. 11. Winch 44 Ow. 34. Noy. 148. Mo. 909. P. 1277.

The Defendant by Proteſtation denying the Preſcription foz Plea ſaith, that the Park long befoze the Time of the Subſtraction of the Tithes afozeſaid was diſparked, and the Deer in the ſame being utterly deſtroyed and killed by the Occupiers and Poſſeſſors of the ſaid Park, and all the Lands lying within the ſaid Park were converted into arable Land and Paſture, and ſo remain; and becauſe the Plaintiff after the Diſparking of the Park would not pay Tithes foz the Cattle and Cozn, &c. therefoze he ſued him; whereupon the Plaintiff demurred in Law.

Hutt. 58. Quære, What was the Judgment in this Caſe? Anſw. This Caſe being reported by *Moor* 865. That the Court was divided in Opinion in this Caſe: *Nichols* and *Hobart*, That the Modus did continue notwithſtanding the diſparkCes Caſe dit arguendo Winch Mo. 909.

ing: *Winch* and *Warberton*, That by the diſparking the Modus was detained, and Tithes ſhould be paid in Kind. d' ea' adj' q' l' mod' continues, Hutt. 58. Winch 45. Accord. ſe ne fuit adj' mes in l' Mergent la c' adj' Accord al

The firſt great Point is:

If a Park have been ſo Time out of Mind, and a certain Sum of Money have likewiſe been paid Time out of Mind foz all Tithes of it, and then the Park be laid open, and all the Deer deſtroyed by the Owner; and further by Judgment in a Quo Warranto, the Park forejudged, and the Liberties of Park reſeiſed. The Queſtion is, whether now the Fozm of Tithing be periſhed, and the Tithe in Kind may be required, as of other Land, becauſe now it is no Park neither de jure, noz de facto.

The ſecond great Point.

Again, as this Caſe is, if the Prezcription have been to pay Money, and ſome Part of every third Deer killed in that Gzound, then if the Park be totally diſparked, as befoze, by the Owner, and by Judgment of the Law; then whether the Prezcription be ceaſed, and the Tithes demandable in Kind from thencefozth.

As to the firſt Point, I hold that the Fozm of tithing remains, though the Liberty of Park, and ſo the legal Park be loſt, foz it is the Land, whereof the Park conſiſts, that is to yield Tithe oz any thing in Lieu of it, and the Park, as it is but a Liberty, is a Thing Incozpozeal, and an Imaginary Pziviledge concerning that Land, and can yield no Pzoſit to the Owner, and therefoze no Tenth of the Pzoſit to the Parſon.

To the firſt Point. 11 Co. 17. a. Ro. 1. 651. Hutt. 57, 58. Accord. Degg. 320.

And therefoze in his Prezcription, he might have laid it in the Land, and might have omitted the Name of Park, foz if the Park were enlarged oz ſtraitned, Prezcription holds foz the old Gzound.

6 Co. 66. b. Plo. 129. b.

And in this Point Lutteral's Caſe is to all Purpoſes moze ſtrong, than this Caſe; yet I grant, that if a Man have Common of Eſtovers to his Houſe, and ſuffer his Houſe to fall down, he can now claim no Eſtovers; and if he Sue foz it, and the other plead that his Houſe is down, he ſhall not have Judgment with a Ceaſing of Execution, till he have re-edified his Houſe, as in a Warrantia Chartæ, oz a Wzit of Meſne, where the Defendant pleads that, he is not ſued noz diſtrained, he ſhall have Judgment, but no Execution foz the Prezent.

Suit for Eſtovers when the Houſe is down. 4 Co. 86.

16 H. 7, 9. 10 H. 7. 13.

Alſo note, that the Defendant may plead in this Caſe of Aſſiſe of Eſtovers, nul tort nul diſſeiſin.

So in a Writ of Dower againſt the Heir, if he plead that the Demandant detains the Evidence, he ſhall have Judgment prezently, with a Ceſſet executio.

cutio. But in the Caſe of Eſtovers the Plaintiff ſhall be barred, for at the Time of the Action brought he hath no Right of Eſtovers, but it is in Sulpence,

4 Co. 87. b. and therefore it is not a Perpetual but a Temporal Barr, and if he re-edifie his Houſe in the ſame Place, he ſhall have his Eſtovers again. And ſo

Quære. Co. L. 393. b. 6 Co. 7. b. 10 Co. 38. a. Dy. 139. I think, if he had pulled down his Houſe and built it again, Tamen quære, if he bring an Aſſize or Quod permittat for his Eſtovers, where his Houſe is down, and Judgment paſſed againſt him; if he ſhall not be barred finally, rather than where Iſſue in Tail in a Formedon is barred by Warranty and Aſſets, and then Aliens the Aſſets againſt his Iſſues, yet the Barr ſtands, which ſhould not, but for the Judgment.

As to the ſecond Point. Upon the ſecond point two ſeveral Branches are Conſiderable, beſides the firſt Point before ſpoken of.

1 Branch. Firſt, if that Part of the Manner of Tithing by the Veniſon be not ſo Arbitrary, and at the Choice of the Owner of the Park, that if there be no Deer killed, that the Parſon cannot complain, but muſt content himſelf with the two Shillings.

2 Branch. Again, though the Veniſon cannot be had in Kind out of that Ground, yet whether the Parſon may not have Recompence for it by Suit in the Eccleſiaſtical Court, according to a Valuation, as it was communibus annis, when the Park ſtood.

As to the firſt Branch of this Point, I ſhall proceed by Degrees.

The firſt Branch of the ſecond Point. Co. L. 43. a. Firſt, if all the Deer ſhould die of ſome Diſeaſe, I am of Opinion, that the Owner were not bound to repleniſh it to ſupport his Form of Tithing, no more than the Leſſee to repair his Houſe deſtroyed with Tempeſt.

Alſo the Ower may kill two Deer Yearly, and pay no Shoulder; and I am of Opinion, that the Cuſtom were as good, as if it were to pay a Shoulder of the Twentieth Deer Yearly, and then he might kill Nineteen without paying any Tithe Veniſon.

So then the Queſtion muſt be meerly upon the wilfull Default of the Owners diſparking, whereupon it is to be marked, that the two Shillings a Year is Certain and Sufficient of it ſelf to have made a Modus decimandi without the Help of the Caſual Veniſon, ſo as it cannot fall into a Non decimando, for Want of the Veniſon.

Dyd. 321. But if it had been Caſual and failed, it had been Doubtful, not only becauſe of the Failing, but becauſe of the original Weakneſs of ſuch a Compoſition of Modus decimandi; for, ſince the Tithe in Kind is an Inheritance certain, it is againſt Nature that it ſhould be extinguiſhed by a Recompence, that is not as perdurable, though not ſo valuable, as it ſelf, like the very Caſe of an Exchange, and upon the Reaſons of Vernon's Caſe, Co. lib. 4 where it is reſolved, that a Joynture made to a Woman, muſt be for her own Life, and not the Life of another. But ſuppoſe that there were an Ancient Compoſition, that the Parſon ſhould have the third Part of the Profits of a Court of a Manno[r] for the Tithes, and then the Tenancies ſhould Eſcheat, ſo as the Court were diſſolved, whether the Tithe ſhould revive.

And now, to the Caſe in Queſtion, the Compoſition in the Creation did carry in it Recompence upon the Tithe, Part Certain, that is, two Shillings

Poſt. 297. a Year; and Part Uncertain, caſual and viſibly depending upon the Will of the Owner of the Land; as if the Parſon had ſaid in the Beginning (for now you muſt imagine the Form of the Agreement or Compoſition by Conſent of the Patron and Ordinary, as the Preſcription lays it) I will take for my Tithes of my Ground two Shillings a Year, and if you kill any

Co. L. 166. a. Mo. 18. p. 65. 1 Roll. 403, 404. 1 Co. 87. a. 2 Cro. 271. 1 Cr. 599. 9 H. 6. 16. a. Hutt. 87. Deer in it you ſhall give me of every third Deer a Shoulder; for Modus & conventio faciunt legem, 19 H. 6. 36. I. S. granted to I. N. Common in his Land, quandocunque averia ſua ierint, if he imploy the Land to till, or let it lie freſh, the Grantee hath no Remedy. And ſo is the Book of 17 E. 3. 26. Now, ſuppoſe that ſuch a Common were granted for Compoſition of Tithe, 31 E. 3. Fitz Annuity 28. A Grants an Annuity to B. till he be promoted to a Benefice, quod duxerit acceptand. Election is given to him, and therefore he

he may refuse for ever, 6 E. 6. Dyer 70. a. if a Man grant the Office of a Keeper of his Park, yet he may dispark. So, if he grant the Stewardship of his Courts, he may release his Rents and Services. If I were bound in an Obligation to give you a Shoulder of every third Deer, which I kill in my Park, yet I may dispark it. So these are not within the Rule, that a Man should not by his own Act defeat or frustrate his own Grant, but it is to use the Liberty, that I reserved to my self upon my Grant standing with my Grant, which was at the first made arbitrary. And therefore is not like the Case of Davenport, Co lib. 8. 144. where the Words there are no more than the Law spake, and therefore were void. But it would have been otherwise, if the Case had been thus. If the Vicarage fall void whilst the Parsonage shall remain in his Hand un-alienedy; and the like I say of 6 Edw. 3. 54. in the Case of Thurston de Holland.

Hutt. 86, 87. 1 Inst. 233, b. 20 H. 7. 106. Co. L. 132. b. p. 72. Dy. 71. b. Jones 152. 1 Cro. 59, 60. Co. L. 191. a. 8 Co. 144.

A second Reason is, that the Composition is on both Sides executed, fixed, and stated, so that though the Parson cannot enjoy his Modus decimandi, yet he cannot resort to the Tithes in Kind, the rather as this Case is, where a Part, that is to say two Shillings, is still due and payable, so as it is not fallen into a Non Decimando.

Reason 2. 1 Inst. 204. a. utra'

Wherein first to remove that, that bleareth the Eyes, which is, that because the Tithe is supposed to be given Originally for this Recompence of Money and Venison, and therefore if the Recompence be detained, the Tithe must revive. And it is compared to Annuities granted Pro consilio impendendo, that for Default of Counsel the Annuity ceaseth. And so of some other Cases, which have been put, whereof I will make Mention in Particular, and therefore I must begin with the Consideration of the Nature and Operation of a Grant of one Thing for another.

Parol (*Pro*) Calthrop's Case 16 of Eliz. D. 335. Ughtred's Case. Co. lib. 7. condition subseq. 15 H. 7. 1. Annuity granted to have a sewer through my Lands, 9 and 15 E. 4. 45 E. 3. 8. one granted a Wardship for good Service to be done by the Grantee for certain Time, he faileth of Service and loseth the Wardship. This Book is plainly so, and put in Issue without doubting whether the Grant were simple or conditional, yet note the Wardship is not a thing executory, but the Service is a thing, for which there is no Remedy. 1 Ro. 651. Co. L. 204. a. 3 Cr. 467. Co. L. 204. a. 174. Pop. 198. Plo. 134. b. 15 E. 4. 3, 4. Plo. 272. a. 455. b. 2 Sand. 360. 1 Cro. 60. Co. L. 204. 2. Pop. 198. Plo. 134, 456. 2 Keb. 533. 1 Co. 42. a. 7 Co. 10. b. Post. 106.

Whereupon I lay this ground, that regularly this Word (Pro) or in Consideration doth not import a Condition, or make the Grant defeasable, though the Thing taken in Lieu be either taken away by the Giver wrongfully, or by any other Person upon a Just Title, so as the Thing given be wholly Lost. And therefore if I. S. give W. Acre to I. N. for B. Acre, and so e Converso, without the Word of Exchange, it will be not defeasable; nay more, if they use the proper Word of Exchange, and that be executed, a wrongful Entry of either Party will do no Hurt, but a rightful Eviction will. But without the proper Word of Exchange, though perhaps it were meant in the Nature of an Exchange, it will not defeat.

But it is true that the Word (Pro) in some Cases hath the Force of a Condition, when the Thing granted is Executory, and the Consideration of a Grant is a Service or some other like thing, for which there is no Remedy but the Stopping of the Thing granted, as in the Case of Annuity granted for Counsel, or for doing the Office of a Steward of a Court; or the Service of a Captain, or Keeper of a Fort, Ughtred's Case Co. 7. lib. And in those Cases the Condition is not precedent, and therefore needs not to be averred performed, when the Annuity is demanded: And these Cases are within the Reason of an Exchange, where the Land given is evicted, for here the Failer of Counsel or Service is a kind of Eviction of that, that is to be done for the Annuity, in as much as he hath no means either to exact the Counsel or Recompence for it, but to stop the Annuity.

And it is to be noted, that this hath so far the Force of a Condition, that it being denied once, it doth avoid the Annuity, not for that one Payment, but for ever, which is to be noted for Use, after in the principal Case, 5 H. 7. 10. If I covenant with I. S. to give him Ten Pounds to serve me a Year; in his Action for his Money he must count for his Service done, and it seems, though he had covenanted è converso, to serve me, for though in that Case I might have an Action for the Service, yet it is not as of an Estate vested of Land of Inheritance, as the Case is here.

Pop. 198. 9 E. 4. 20. Br. Covent. 22. Plo. 272. a. 26. b. 15 H. 7. 10.

Post. 106.

In another Case it works by Condition precedent, as in all Personal Contracts, as I sell you my Horse for Ten Pounds, you shall not take my Horse except you pay me Ten Pounds, 18 E. 4. 5. and 14 H. 8. 22. except I do expressly

7 Co. 10. b. Br. Condition 67. 20 H. 6. 34. b. 35. b. Post. 88. Dy. 30. a. 76. a.

8 Co. 147. a. 1 Cro. 271, 272. 16 H. 6. 1. a Mo. 877. Poſt. 89. 6 H. 6. 33. b. Yelv. 67. 1 Cr. 176.

expreſly give you Day, and yet in this Caſe you may let your Horſe go, and have an Action of Debt for your Money, and ſo may the Taylor retain the Garment till he be paid for the Making, by a Condition in Law.

So if I retain one to ſerve me a Year for Ten Pounds, he cannot demand the Ten Pounds, but he muſt aver he hath ſerved me out the Year. And 32 E. 1. ff. avowry 245. an Avowry was made for not repairing a Park-

Plo. 134. b. Pop. 198.

pale anew; the Tenant anſwered, that his Tenure was to repair for the old Pale. And Catesby 15 E. 4. 4. puts it of a Grant to make a new Pale for the old, and holden in both Caſes, that if the old Pale be withholden, he needs not to make a new, for here is no Remedy for the old Pale; and perhaps neither in Caſe of Tenure nor of Grant; in this Caſe the Detaining of the old Pale will diſcharge more than for that one Time, for in that Caſe the old is allowed towards, or for the new Pale per vices, not ſo in the Annuity granted pro conſilio, which is totally for Counſel, and

Plo. 141. a. Apr. 297.

therefore will extinguiſh wholly. And the Caſe 9 E. 4. fol. 20. and 15 E. 4. fol. 4. is full in this Point; for there was a Compoſition between the Abbot of Sempringham and the Maſter of Burton-Lazer, whereupon the Maſter granted, that the Abbot ſhould have certain Tithes without Contradiction; and the Abbot granted him Forty Shillings a Year out of the Houſe for the ſame. And the Opinion was, that though the Maſter take away the Tithes, yet the Abbot muſt pay the Rents, for both Parts are executed, and either Party hath Remedy for the Wrongful detaining; but Needham ſays, that if the Rent had been granted pro decimis habendis abſque calumnia, it would have been otherways perhaps. Graye's Caſe, Co. lib. 5. fol. 78. is full to this. If one had a Common in my Ground Time out of Mind, and hath paid me for it Hens and Eggs, yet this is not entire, that he need declare of both Parts, becauſe it is no Condition, and conſequently, though he refuſe to pay the Eggs, that he ſhould hold the Common. But if it were Conditional, as in the Caſe of Potwater, there Paying, or to pay, becauſe in that Caſe there is no Remedy, as in the former by Diſtreſs, will be taken Conditionally.

It is true that an Appropriation at the Common Law might be made Preſentable, for that was Spiritual ſtill while it was Appropriate, but ſo is not this F. N. br. f. 35. and Grindon's Caſe. Plo. Comm. Co. L. 204. a.

Another Reaſon that the Tithe in Kind cannot be reſtored is, becauſe the Tithe in Kind is actually diſcharged and extint, for now that, which of Common Right ſhould have been the Tithe, is made of the ſame Nature with all the reſt of the Fruits, Lay Fee, ſo as if the Owner ſhould, through Ignorance of his Caſe, ſet out a Tenth, yet if the Parſon ſhould take it, the Owner might bring an Action of Treſpaſs, as for any other Part of the Fruits: And if the Parſon ſue for Tithes in Kind, the Owner ſhall have a Prohibition for drawing his Lay Fee ad aliud examen.

Plo. 204. a.

The Caſe of 18 Eliz. Dyer 349. where it is adjudged that *Modus decimandi* of Wool and Lamb doth diſcharge the Natural Tithe of Grain and Hay. Apr. 247. 4 Co. 18. a. Apr. 309.

On the other Side, that, that was given in Lieu of Tithe, is become Part of the Inheritance of the Parſon, and Part of his Spiritual Fee, for which he ſhall have Remedy in the Eccleſiaſtical Court. So in the Caſe of the Biſhop of Wincheſter, Co. lib. 2. fol. 45. where the Land of the Biſhop being diſcharged of Tithes, was diſcharged in the Hands of Lay Farmers as meer Lay Fee, and the Biſhop could not demand Tithe of his Farmers, for there is no Tithe for all his Lay Fee.

2 Co. 45. a. 3 Cro. 59, 95, 76, 784. 2 Cr. 49. a. Yel. 2. Degg. 313. 2 Cr. 50.

And ſo alſo the Caſe of Pigot and Herne there, where it is preſcribed, that the Lord of a Manor hath uſed to pay, Time out of Mind, a Penſion to the Parſon for Tithes of his Manor and Tenements, and had the Tithes of it for it, and he Sues for thoſe Tithes in the Spiritual Court, for it was inſtead of the true and ſpiritual Tithes, though in Lay Land, otherwiſe here where it it diſcharged.

1 Cr. 423.

And 8 E. 4. 18. F. N. B. 41 G. and 43 K. a Prohibition upon Preſcription upon Diſcharge of the Tithes for Lands given to the Parſon, and if the Parſon alien the Land with Conſent of Patron and Ordinary, or ſuffer a Recovery, wherein Aid is prayed of them, as Fitz. N. 48. b. is. I am of Opinion, that as his Succeſſor can have no Juris utrum, ſo he cannot reſort to his Tithe.

And the Reg. fo. 38. upon Diſcharge of Tithe by Parſon, Patron, and Ordinary, for Land given unto the Parſon and his Succeſſors, runs thus, Et quia diſcuſſio hujuſmodi donationis & conceſſionis de laico feodo in curia noſtra & alibi tractari debet, vobis prohibemus, &c. ne placitum aliquod laicum feodum tangens,

gens, &c. Also the Writ counts as well the Grant of the Land as the Grant of Tithes, Lay Fee. In all these Cases, if the Thing given were alienes, which cannot be without the Parson, Patron, and Ordinary, which have absolute Power, or were evicted, yet the Discharge must stand for the Reasons before mentioned. And because there is nothing in the Prescription, that inforceth a Condition, but rather only a Consideration, which is the meer Difference, whereupon Grayes Case, Coke lib. 5. fol. 78. stands. Now there is nothing in this Case, that can inforce an Absolute Dissolution of the Composition. For as it is said, there is nothing to let; but the Park, or Ground may answer Tithe hereafter. And to say that Tithe in Kind may be required in the mean Time is absurd, both because, as I observed, if it be a Condition, it must destroy the whole Estate; and also because there cannot be an Inheritance in Modus decimandi, and at the same Time Tithe in Kind contra modum Decimandi. And if it be a Reason sufficient in this Case to demand Tithes in Kind, because the Modus is defrauded, by the same Reason every willful Denial of a Modus will give the like Advantage; whereas though it be always laid in the Prohibition, that the Modus is tendred, yet that is never traversed, but only the Prescription it self de modo, because that the Denial doth not alter the Right, but you may and must sue for it, as in other Wrongs. 3 Cro. 405.

And though for the Time that there are no Deer in the Park, there can be no Venison according to the Modus Decimandi, yet the Park may be restored and replenished at any Time, and therefore there can be no extinguishment of the Modus, and both Tithes cannot stand together, the Modus Decimandi of the Inheritance, as being Extinct, and the Tithe in Kind as it were hac vice. Co. L. 114. Godb. 194. p. 278.

* The last great Question, Whether the Vicar in this Case can have any Remedy for the Loss he sustains, in that he hath not the Shoulders, nor cannot have them, because there are none. Wherein the Doubt consists in this, how he can have Recompence for that, which is not?

* The last great quest. Remedy in Law for a thing not in esse, much more reasonable to have Damage for it, than the Thing it self, adjudged, as in the Assise of Estovers. There the Incertainty together with the Nullity of the thing payable must make the Difference, which also is nothing. Fitz. Na. Br. 58. I. As there is no Tenant in Tail without Possibility of Issue, as long as the Persons live, be they never so old, so as long as there is Soil, there is Possibility of Wood, much more here Possibility of Deer. Ow. 34. Noy. 148. Co. L. 28. a. 2 Cro. 257. Accord. mes Yelv. 188. &c. Brown. 220. ultra. 2 And. 7.

I answer, that whersoever I suffer any Injury joined with a Loss, the Law shall give me a Remedy and Recompence according to my certain or uncertain Loss, yea, and sometimes where the Thing is not in Being, but utterly extinguished. If the Case here were, that he should have Yearly two Deer out of the same Park, the Disparking would not hurt, for he should have the Value ever, and so likewise where he sets not out his Tithes, nor pays not the Modus, for nummus est νόμος, as it is the Law and Measure of all Things, for no Man ever doubted that the Non-payment of the Modus restored the Tithe in Kind, though it be alledged of Form that he was ready. And therefore, if a Man have Common of Estovers in my Woods, so many Loads by the Year certain, or else uncertain, as much as he shall spend in Fires, and in Repairs of his House; if I stub up this Wood, so as there neither is nor will be any Wood again, yet he shall have an Assize from Year to Year of his Common of Estovers, whereof these consequents follow; First, that the Inheritance of the Common of Estovers doth remain, notwithstanding that there are no Estovers, for else he could not have an Assize, wherein he must declare of his Inheritance or Freehold, at least by Grant, or by Prescription. Next he shall recover a Seisin of those Estovers, which are not in Being, whereof he is supposed to be disseised, and also Damages, not according to that, that it now yields, but according to that Value, that it yielded communibus annis, though it were uncertain. So in Maries Case, Coke lib. 9. fol. 111. If any Man feed in a Common wrongfully, every Commoner may have an Action of the Case against him, and by the same Reason, if the Lord of the Soil Plough it up, or make a Water of it, every Freeholder may have an Assize, and every Copyholder an Action of the Case, and yet at this Time there was no Profit of Common at all, and the Possibility of Restoring of it less than in this Case, and therefore there can be no Reviving the very Tithe, which must be for the Inheritance, or not at all.

† Touching the Uncertainty; if a Man Grant an Advowson with Warranty, and the Tenant in a Writ of Right of Advowson Vouch, he shall have (if he lose) Recompence in Value in Land, or other certain Profit, and yet the Advowson it self is utterly of an uncertain Value. So of a

† An Advowson descended may be put in Value for Land recovered upon Warranty, 9 H. 6. 56. And for an Advowson covered in a Writ of right of Advowson upon Voucher, one may have Land in Value for Recompence. 3 E. 2. F. Rec. in Value 9. 8 E. 2. F. Rec. in Value 11. & Bracton. 3 Co. 33. a. Post. 297, 304. 9 Co. 113. a. Cr. Jac. 195.

Liberty bona & catalla felonum, &c. which may be valued by an Eſtimate Communibus annis; if I let my bona & catalla, or Profits of Court rendring Rent, it is no Plea in Debt for my Rent, that he had no Profits that Year; but if the Leſſor Diſcharge or Relcaſe all, otherwiſe it may be, but here is no perpetual Diſcharge.

2 Co. 44. b. 48. a. But the very Caſe ſeems to be P. 18. Eliz. Dyer 349. pl. 16. where the Caſe is, that the Manor of Ellington, whereof an Abbot was ſeiſed at the Time of the Diſſolution, lying within the Pariſh of Pykerke, and ſo uſed to pay only Tithe-wool and Lamb Time out of Mind, and now the Land being uſed to Meadow, and Tillage, the Parſon demands the Tenth of Hay and Corn; and, by the Opinions of the Juſtices and Clerks of the King's Bench, Prohibitions be uſual in ſuch Caſes by force of the Word [diſcharged] in the Stat. 31 H. 8. For Modus decimandi diſchargeth all other Manner of Tithings, quod nota, for the Uſe before, that, where there is a Modus decimandi, the Tithe in Kind is utterly extinct and diſcharged: And note, that if a Man have a Manner of Tithing of Land ariſing upon the Ground, and he turn his Ground to another Uſe, it ſhall neither fall to a non Decimation, nor to a Reſtitution of the Tithe in Kind, but to an Allowance by Eſtimate of the ordinary Profit, that the Form of Tithing was wont to yield. But Quære, whether that Caſe ſhall not be holpen by Force of the Statute 31 H. 8. by which alſo Unity of Poſſeſſion is holden a Diſcharge of Payment of Tithe, though no Diſcharge of Right. And although it may be true, that in that Caſe the Land lay alway to Wool and Lamb, ſo as there could be no other, but it was indeed the Tithe in Kind, and ſo not preſcriptible; yet when the Preſcription is beyond Memory, it may well ſtand that it was ſo, when the Land was imployed to Corn, for the contrary appears not. And again, if the Owners had not uſed to pay Time out of Mind the juſt Tenth of the Wool and Lamb, but a leſs Proportion, ſo as it were truly a Modus decimandi, of a ſpecial Commodity, if the Land be turned to other Uſe, as of Grain or of Hay, the Form of Tithing cannot change, except you will ſay, that he ſhall pay ſuch a Proportion of the Fruits it now yields, as it did of the other; ſo the Modus ſhould be in the Proportion, not in the Kind of Profit; yet that will not ſerve, as the Caſe may be, as if there be ſuch a Proportion of Lamb, or ſo much in Money for them at the Pleaſure of the Tenant. And note, that the Statute 31 H. 8. was neceſſary in that Caſe, becauſe the Diſſolution elſe would have ceaſed the Priviledge, whereas in this Caſe there is no Cauſe of ceſſer, becauſe it dependeth not upon any thing that ceaſeth. But it ſeems, that, had not the Statute of Diſſolution provided for the Continuance of the Priviledge of Abbeys, they had all died, ſo then it ſeems that the very Tithe had revived, Quære.

1 Ro. 651.

Q. Diſmes in ſont extinct per Unity d' Paſſion Dav. 6. a. Poſt. 298. accord.

2 Cr. 508, 608. 1 Cro. 423. 1 Roll. 654. Jones 368.

Now a Word of the Exception:

It hath been ſaid, that the Preſcription of the Modus decimandi is not well laid, becauſe the Park, concerning which the Preſcription ſhould be, is not laid to be by Preſcription, but only laid to be Antiquus Parcus.

Whereunto I anſwer two ways:

Dy. 70. b. Poſt. 118. First, that the Preſcription is laid not in the Park, but in an 140 Acres in Cowfield, late Parcel cujuſdam antiqui parci, and that the Tenant and Farmers of the ſame 140 Acres have uſed to pay to the Vicar of Cowfield two Shillings Yearly, and one Shoulder of every third Deer killed within the Park, in Satisfaction of all Tithe payable for the 140 Acres.

Again, the Liberty of Park is not in Queſtion, but a Form of Tithing concerning the Park, and therefore no Cauſe to lay the Preſcription in the Park, according to the Rule in the Biſhop of Salsbury's Caſe, Co. lib. 10. fol. 59. b. where one claims the Office of a Surveyor by Grant from the predeceſſor Biſhop with a Fee, and Avers, that the ſame was Antiquum Officium, and it was held nought, becauſe he claimed the Office it ſelf by Preſcription; ſo here, if he were impleaded in a Quo Warranto for the Park it ſelf, it ſhall be no Plea to ſay that it was Antiquus Parcus, but there he muſt plead a Preſcription for the Park; but where another Thing is claimed as incident to the ſame, otherwiſe it is, as where a Keeper

Yel. 201, 2 Cro. 605. 1 Cr. 500.

Co. L. 121. a. 2 Cro. 500. 1 Cro. 500. Poſt. 118.

claims

claims Profit of a Park by Preſcription, he alledgeth not a Preſcription in the Park, but Antiquus Parcus general, 6 E. 6. Dyer 71.

But, if the Diſparking be a Point material, it is utterly inſufficiently pleaded; for it is a Word vulgar, and even in vulgar Senſe uncertain; for common Speech takes a Ground diſparked, when only the Deer are taken away, though the Pale ſtand, and the Liberty of the park be found. But it is a Word utterly unknown to the Law, and therefore can bear no Iſſue without more Certainty; and the Particulars of Diſparking are only that the Deer were utterly deſtroyed, and the Ground turned to Arable and Paſture, ſo the Pale may ſtand and the Liberty perfect, and ſo may be reſtored in integro at any Time. Another groſs Fault is, that he laid the Diſparking to be by the Occupiers and Poſſeſſors, and not by the Owners. Poſt. 234.

(48) *Sir* Marmaduke Wivel's Caſe. Quare Imped.

IN Caſe of Quare Imped. brought by Sir Marmaduke Wivel this was the Point. Tenant in Tail of an Advowſon, and his Son and Heir joined in a Grant of the next Avoidance. Tenant in Tail died, and it was adjudged, that the Grant was utterly void againſt the Son and Heir, that joined in the Grant, becauſe he had nothing in the Advowſon, neither in Poſſeſſion nor Right, nor in actual Poſſibility at the Time of the Grant. Hereupon a Writ of Error was brought, but the Error was aſſigned only in a Diſcontinuance, for the Judgment was given upon a Demurrer.

Tenant in Tail and his Son joined in a Grant of an Avoidance. Winch Ent. 677. 10 Co. 47. b. Plo. 432. b. Co. L. 378. b. Litt. Sect. 446.

Error.

(49) Harvey *verſus* Duckin, Paſc. 13 Jac. Caſe.

HArvey an Attorney brought an Action upon the Caſe againſt one Duckin, and declared, that whereas one White had made him a Bill of Forty Pounds Debt, and had ſealed and delivered the ſame, the Defendant ſpake theſe ſlanderous Words of him; that he had ſhewed him a Bill of Forty Pounds (meaning that Bill) unſealed, and after ſhewed it him ſealed, and that he had forged the ſaid Seal to the ſaid Writing. The Defendant by Inducement of other Words traverſed theſe Words; and it was found for the Plaintiff, and yet Judgment was given againſt him, for the Innuendo was of no Uſe, for ſince the Words were only a Writing, which is utterly uncertain, an Innuendo will not change the Matter of the Words, for that is to make the Words otherwiſe, than they were by an Innuendo.

Innuendo. Brownl. 1. R. 9. 4 Co. 17. b. 20. a. Ante 2, 3. Apr. 268 269. Action of the Caſe that he had forged a Seal. 2 Cr. 430. Ant. 8.

Yelv. 21. Accord.

Out of the Court of Wards came this Caſe.

Chequer.

(50) *Sir* William Fleetwood's, and *Sir* Roger Aſton's Caſe.

SIr William Fleetwood, late Receiver there, being indebted to the King for Arrearages of his Receipts, and being ſeiſed in Fee of the Manor of Cranford Saint-John, and Cranford le Mote in Mid. did convey the ſame to Sir Roger Aſton in Fee, and he conveyed it to the King, his Heirs and Succeſſors, and preſently took it again from the King to him and his Heirs, Reddendo annuatim pro Manerio de Cranford Saint-John 34 Shillings, & pro Cranford le Motte 20 s. pro omnibus aliis redditibus, ſervitiis, exactionibus & demandis quibuſcunque. And after Sir William Fleetwood became farther indebted upon his Account to the King. The Queſtion hereupon made by Maſter Attorney of the Wards was; whether the ſaid Manors were extendible, and liable to any of the Debt aforeſaid. My Lord Coke and I were of clear Opinion, that they were not chargeable; for the Land it ſelf was never chargeable for it ſelf, but in reſpect of the Perſon, who was Debtor, as in the Caſe of a Statute. So as when the King takes the Land, the Debt is not thereby diſcharged, but may be recovered againſt the Debtor himſelf, but the Land it ſelf in the King's Hand is not chargeable. And then, when the King conveys the Land over, he cannot againſt his own Conveyance

The K. takes Lands of his Debtor, and puts it away again, the Land is freed. 8 Co. 171. a. 10 Co. 55. b. 7 Co. 21 b. 11 Co. 92. b. Plo. 321. a. 261. a. 263. b. 11 Co. 90. b. 12 Co. 2. Plo. 72. b, Apr. 60. M. R. 44.

Plo. 72. a. 45 E. 3. 22. b. 11 H. 7. 27. 2 Ro. 470. 5 H. 5. 27. 2 Cr. 425.

Co. L. 265. t. 45 E. 3. 22. 10 Co. 47. b. 3 Cr. 40, 551. Plo. 72. b. 3 Co. 12. b. 13. a. 2 Cr. 425. 2 Ro. 470. N. B. 104. 11. 2 Cr. 425. Dy. 193. 3 C. 126.

beyance charge his Land, although the Debt be of ſuch a Nature that it gives no Right in the Land, and therefore a Releaſe made by the King to the Tenant of the Land of all Rights and Titles doth not diſcharge it. Yet againſt his own Conveyance (the) Conuſee of a Statute in ſuch a Caſe cannot require Contribution, which is the Reaſon of the Books, that all other Lands in the Hands of other Feoffees are by that Occaſion diſcharged, though ſuch as be in the Hands of the Debtor himſelf are ſtill chargeable, and we made no regard of the reddendo here, as of no Uſe in this Caſe.

But [my Lord Chief Baron] made a Doubt of this, in reſpect (as he ſaid) that he took the Uſe of the Exchequer to be otherwiſe, except the King's Patentee had the ordinary Clauſe of Covenant and Grant to be diſcharged of all Duties, Debts and Demands.

And therefore we all agreed, that our Opinion in this Caſe ſhould be made up in the Decree for the Diſcharge of this Land, without Prejudice to the Uſe of the Exchequer for the King's Debt there.

(51) *Sir* Thomas Pickering's Caſe.

The King's Ward Knighted. Plo. 268. a. Apr. 91. 2. 2 Cro. 388, 389. 2 Roll. 39.

THe Attorney of the Wards asked another Queſtion by word of Mouth, which was: If the King knights his Ward within Age, after the Death of his Father, whether thereby he loſt the Wardſhip of the Land, ſo as thereby the Ward may preſently require Livery, though he be within Age.

8 Co. 173. a. 6 Co. 74. b

And we were of Opinion, that though the Value of the Marriage remain due, notwithſtanding ſuch Knighting, becauſe the ſaid Marriage was veſted in the King before; as it was reſolved in Drewries Caſe; yet the Reaſon of that Caſe will guide this: For by the making him a Knight the King allows him to be of full Age, and ſo for the Time paſt the Profits are well received; but from thenceforth the Wardſhip is to ceaſe, and ſo conſequently the Profits, and he to ſue his Livery preſently. Poſt. 90. 91.

For Reverter. Co. B. v. Caſe Eſſoin.

(52) *The Earl of* Clanrickard, & uxor verſus Robert, *Viſcount* Liſle.

1 Cr. 341, 511. Jones 7. Eſſoin B. 104. Ante 1. Poſt. 329. Hutt. 28, 43, 93. Hob. 8. 9 Co. 15. b. For the Day of Appearance for Vouchees. Ro. 1. 825. Winch 34.

THE Earl of Clanrickard and his Wife brought a Formedon in Reverter againſt Robert Viſcount Liſle, ut ſupra, wherein he was eſſoined after the View, and then pleaded in Abatement of the Writ, ut ſupra, which was adjudged good, ut ſupra, and then vouched two, whereof one was firſt eſſoined, and then the other with an Idem dies always to the Demandant, Tenant and Vouchee. And now Quindena Paſc. which was the laſt Day of the Eſſoin, both the Vouchees appeared, and at the ſame Day my Lord Liſle Tenant caſt an Eſſoin both for himſelf and his Attorney. And it was excepted unto, that this Eſſoin lay not according unto the Book, 3 H. 7. 13. which being ſpoken to at the Bar twice or thrice was at laſt ſpoken to by the Court, and agreed una voce [by my ſelf] [Winch] [and Nichols] that the Eſſoin did lie. For firſt, there is no Statute that takes away the Eſſoin in this Caſe, ſo then it is to be judged by Reaſon, Books, and Preſidents of Court.

Eſſoin 19. 54. Br. 71.

Now, for Books, that of 22 H. 6. is direcly the principal Caſe, and the Eſſoin excepted unto there, as it is here, and it was allowed clearly by the Court with this Reaſon. That the Tenant may ſay, that the Vouchee is not the ſame Perſon, and may have divers other Pleas againſt the Vouchee; and 5 E. 3. Eſſoin 54. is the like, where the firſt Vouchee was eſſoined after an Eſſoin of his Vouchee. And 13 E. 3. Eſſoin 6.

Now the Preſidents are clear and common to the ſame Purpoſe, and a Roll of that Book 22 H. 6. which is the very Caſe, was found according to the Book between Crulle and Manſell, Mich. 22 H. 6. in the Eſſoin Roll. And ſo Hill. 34. H. 6. between Belgrave and Harding, and divers others, but the

the Book of 3 H. 7. was not warranted by any Roll, for I cauſed it to be ſearched.

Now the Reaſon of the Caſe is this, that though the Tenant had an Eſſoin before, that was in another reſpect, that is to ſay, between him and the other Demandants: But now he was in another Order and Degree of Plea between him and the Vouchee, who being not yet entred into the Warranty, might (as before) either himſelf Vouch, or the Tenant; but if he were once actually entred into the Warranty, then he could be no more eſſoined, nor the Tenant, who had now done with the Vouchee, and was alſo out of Pleading againſt the Demandants, becauſe his Plea was put into the Mouth of the Vouchee.

And therefore the Book 29 E. 3. 48. Simkin Simons Caſe it was reſolved, that the Vouchee and Tenant may have either of them one Eſſoin before they enter into the Warranty. But now though the Eſſoin be granted in reſpect of the Pleas, that may ariſe between the Vouchee and Tenant, as hath been ſaid; yet it is to be entred between the Tenant and Demandant, and not between the Tenant and Vouchee, as the ſaid Book is 29 E. 3. 48. And idem dies is ſtill to be given to the Parties not eſſoined. And though the Eſſoin here were caſt both for his Tenant and Attorney; yet it was good enough being but a ſurpluſage for the one. Eſſoin 182. 5 Co. 18. a.

So the Eſſoin was adjudged and adjourned here as due, and is alſo the moſt ſafe, becauſe it is Error to deny the Eſſoin, when it ought to be granted, and not è contra. 8 Co. 59. a. 5 Co. 39. b. Dy. 26, 169.

(53) Richard Cox *verſus* William Barnſly, & alios.

Richard Cox brought an Action of Treſpaſs againſt William Barnſly and others for breaking his Cloſe at Bromſgrove, whereunto the Defendant upon the new Aſſignment pleaded not guilty, and the Jury found a ſpecial Verdict thus: That Barnſly the Defendant was ſeiſed of the Land in Queſtion, and held the ſame of the Manor of Bromſgrove, which is ancient Demeſne, and that Cox recovered againſt him Forty Pounds in the Common Pleas, and took out an Elegit, by Force whereof the Sheriff delivered him the Land in Queſtion, and he entred, upon whom Barnſly and the reſt entred, whereupon Cox brought his Action of Treſpaſs, & ſi, &c. Treſpaſs. Co. B. Wigorn. Hill. 10 Jac. Rot 2541. Ancient Demeſne bars not Execution by Elegit. 1 Roll. 304. Mo. 211. p. 351. Hutt. 117. New Dalt. Sher. 127.

So the whole Queſtion was, whether the Lands in ancient Demeſne may be delivered in Execution by the Sheriff by Force of an Elegit out of the King's Court. And it was adjudged by the Court [Warberton being abſent through Sickneſs this Term] that the Execution was well done. Yet it was agreed, 5 Co. 105. a. Accord. 3 Cro. 826. 2 And. 178. 9 Co. 77. b.

First, that no Freehold holden in ancient Demeſne could be recovered in the Court of the King.

Secondly, that though the Freehold were not to be recovered by the Action, yet if the Poſſeſſion was to be recovered by the Action brought in the King's Court, ancient Demeſne is a good Plea; and that is Alden's Caſe Co. lib. 5. 105. a. though the Ejectione firmæ be brought by the Leſſee againſt the Leſſor, and 46 E. 3. fol. 1. A Writ of Ward lieth not in the King's Court, nor a Writ of Waſte, though it be of a Leaſe for Years, 7 and 8 H. 6. Cr. Cr. 9. 105. a.

Thirdly, ſome Actions lie not at the Common Law, though they touch not the Poſſeſſion, for the Preſumption that they would bring the Title of the Freehold in Queſtion, becauſe they commonly do ſo; as a Replevin and an Action of Account of Profits of Lands, 40 E. 3. 40. 46 E. 3. 1. 21 E. 4. Fitz. Ancient Demeſne 6. but in Treſpaſs vi & Armis, or upon the Stat. 5 R. 2. though the Freehold come in Debate, yet ancient Demeſne is no Plea, 46 E. 3. 1. and 2 H. 7. 17. the Cauſe is, as one Book ſays, that the Iſſue is upon the Wrong. And the other Book ſaith, Court of an ancient Demeſne hath no Juriſdiction. 5 Co. 105. a.

Another Point conſiderable is this.

That if a new Action be given by Statute, which lieth in the King's Court, and will not lie in ancient Demeſne, yet if that Action meddle direcly with the Poſſeſſion, you ſhall rather loſe your Action than have it in the King's Court, to the Prejudice of the Privilege of ancient Demeſne. And that is the

the Caſe of an Action of Waſte, 7 H. 6. 35. and 8 H. 6. 34. But the Reaſon is given in Books, that the Tenant in ancient Demeſne ſhould not be ſubject to Statute Laws, becauſe they do not contribute to Fees of Knights of Parliament, and ſo may ſeem to have no Voice there. I hold that Conceit vain, for that is but an Eaſe granted them in Favour of their Labours of the Earth, as many others have Freedom from ſerving in Juries, Pontage, Murage, and many ſuch, and F. N. B. 128. The Villains of Lords of Parliament are free from Contribution to the Fees of Knights, as well as they, and we ſee that they are ſubject to all other Statutes not concerning their Freehold, as well as others.

4 Co. 65. 2 Saund. 254. Plo. 59. a. Apr. 271. N. B. 14. e.

Again, Actions at Common Law, upon which no Remedy could be had in ancient Demeſne, do lie in the King's Court, though they ſtir the Poſſeſſion, as Quare Imped. 7 H. 6. 35. becauſe they cannot Write to the Biſhop, wherein the Reaſon is, becauſe the Common Law being as Ancient as their Priviledge is may not indure, that by Pretence of Priviledges there be a Failer of original Right, as that Caſe is. But of new Rights or Remedies brought in by Statutes (which are not preſumed to intend their Prejudice) it is otherwiſe.

Dy. 85. a.

Now to the Caſe in Queſtion. Though it be true, that the Poſſeſſion of Land in ancient Demeſne be gained by the Sheriffs Act following upon award of the King's Courts, yet the Land it ſelf was never put in Plea directly in the King's Court, and therefore differs from all other Caſes before mentioned; and therefore touching that there is 2 E. 2. Fitz. Execution 118. expreſs, that the Cognizee of a Statute having taken Land in ancient Demeſne in Execution had an Aſſize of it in the King's Court, and had Judgment. And 7 H. 7. 10. it is admitted that ſuch an Execution is Good, for otherwiſe the Diſputation were vain to preſerve it againſt the Recovery had by Covin againſt the Freeholder. And Alden's Caſe is of Opinion for it; and 7 H. 4. fol. 14. it is ruled, that upon an Action of Debt brought againſt the Heir in the King's Court for the Debt of his Anceſtor, Lands in ancient Demeſne deſcended ſhall be liable to the Execution. Againſt which Books there is only 8 E. 2. Fitz. Execution 136. expreſly, and 15 E. 3. Fitz. Execution 62. which is ſleight; for 22. Aſſize 45. is no other but that an Aſſize lies not for him, that hath ſuch an Execution in the King's Court. Whereupon the Reporter infers his ſingle Opinion, that therefore Execution cannot be of ſuch Lands, which is no Conſequent, for a Man may take a Leaſe of ſuch Lands, though he cannot have an Ejectione firme of them. And the Chief Juſtice ſaid, he was of Opinion, that though an Aſſize in this Caſe could not lie in the King's Court for him, that hath ſuch an Execution, yet he may have an Aſſize in the Court of the Manor by Writ of Right, Cloſe and Proteſtation to ſue it in the Nature of an Aſſize, though the Aſſize in this Caſe be given by the Statute, like to the Caſe 14 H. 4. 20. where Hankford is of Opinion, that if a Man have Cognizance of Pleas, it ſhall not ſerve him for a new Action created afterwards by a Statute: But if an old Action be afterwards given by Statute, in a new Caſe it will ſerve, and ſo here. And the Chief Juſtice further ſaid, for another Reaſon he held this Caſe clear, that ſince the Judgment was Good, that Cox ſhould recover the Debt, and that the Elegit did Warrant the extending and delivering Halt his Land, and the ancient Demeſne is his Land, as well as other, ſo as he had Warrant to deliver it; and is not to diſpute what is liable, and what not; neither is the Sheriff, nor he, that receives it of him, ſubject to an Action of Treſpaſs, as if it were a Nullity in the Act, but perhaps if it were relievable, the Way to relieve it were by Audita Querela, becauſe there was no Time to plead it before.

5 Co. 105. b.

5 Co. 105.

Plo. 124. b. Conuſans Br. 21. Poſt. 243. Dav. 75. Poſt. 341.

10 Co. 76. a. b. 9 Co. 68. a. 6 Co. 54 a. Plo. 394. b. 396 a. 2 Saund. 101, 193. 1 Cr. 395. 2 Cr. 3.

William

(54) William Keble, *Executor of* Robert Keble, *againſt* Osbaſton. Debt. Co. B.

William Keble, Executor of Robert Keble, brought an Action of Debt upon a Bill obligatory of Thirteen Pounds Thirteen Shillings four Pence, againſt Francis Osbaſton Executor of the Teſtament of another William Keble, the Defendant pleaded that the ſaid William Keble, the ſuppoſed Teſtator, died Inteſtate, and that before this Writ purchaſed, the Adminiſtration of his Goods was committed to one Edward Keble, who adminiſtred and ſtill doth. The Plaintiff replieth, that William Keble died Inteſtate, and that after his Death, and before the Adminiſtration aforeſaid granted, divers Goods of his (and names them particularly) to the Value of this Debt, came to the Hands of this Defendant, which Goods the Defendant, as Executor to the ſaid Keble, Adminiſtravit ſeu aliter ad uſum ſuum proprium diſpoſuit & convertit, & hoc, &c. Whereupon Iſſue was taken and found it againſt the Defendant in the diſjunctive as aforeſaid, and it was adjudged for the Plaintiff; for the Point in Iſſue is direcly found, and ſo it is within the Statute of Jeofailes, and the Iſſue alſo is not improper, for though the Verdict be true, if either he did Adminiſter, or otherwiſe convert it to his Uſe, yet both muſt be as Executor, for ſo is the Pleading and the Verdict, and then it is but the ſame Thing ſpoken two Ways, one according to the proper Stile of Law, the other according to common Speech; and therefore if Iſſue had been taken only that he had converted the Goods to his own Uſe, perhaps it would have been good enough, eſpecially if it were added as Executor, as here it is. And ſince there was an Execution in wrong before the Adminiſtration granted, the Plaintiff had Cauſe of Action veſted in him, which ſhall not be taken away by the Adminiſtration granted after, though it be before the Action brought, the rather becauſe thoſe Goods taken away by wrong before the Adminiſtration ſhall not be Aſſets in the Hands of the Adminiſtrator till they be recovered, or Damages for them.

London. Waller. Trin. 12 Jac. Rot. 4087. Verdict in the disjunctive. 5 Co. 33. b. Cr. Car. 89.

1 Cr. 7.

Br. Executor 165. 74. Execution. Executors by wrong and then Adminiſtration taken. 5 Co. 30. a. 34. a. Cr. El. 102, 505, 565. 1 Cro. 88. 89.

(55) Nichols *verſus* Grunnion. Debt.

" THomas Nichols brought an Action of Debt upon an Obligation of " Forty Pounds againſt Joane Grunnion, the Condition was, to per" form an Award to be made and delivered in Writing. The Defendant " pleaded that they made no Award. The Plaintiff ſhewed the Award " made, De & ſuper præmiſſis in conditione, &c. in Writing, which was, that " the Defendant Joane ſhould depart from the Houſe, wherein ſhe dwelt, " and other Things, which appeared not to concern the Plaintiff, and ſhould " pay the Plaintiff three Pounds Ten Shillings, and aſſigned the Breach " in that." The Defendant rejoined that the Wardſmen made no ſuch Award, whereupon Iſſue was taken and found for the Plaintiff, and yet it was adjudged againſt him, becauſe it was an Arbitrament but only on one Side, and ſo Void, and none in Law, according to the Book 7 H. 6. 40. 1 Saund. 326, 327. 2 Saund. 190.

For, though as Baſpoole's Caſe ſays, an Award may be made by Parts, the Submiſſion being by Word, and though it be upon Bond in the common Form for all Cauſes, ſo as the ſame Award, &c. it ſhall not be extended further than the Cauſes made known to the Wardſman, yet it muſt in that Caſe end all Controverſies appearing to the Court, or elſe it ſatisfies not the Condition of the Obligation; whereof it follows, that becauſe every Controverſie is between two Parties at the leaſt, it appears to the Court the Controverſie cannot be ended, except it be ended in reſpect of them both, and that may be either expreſſed or implyed. Expreſſed, as if an Award be, that an Obligor in a ſingle Obligation ſhall pay the Debt; this is no Award, except it be provided that he be diſcharged becauſe Payment is no Diſcharge in that Caſe; but if the Ward be, that he ſhall pay Ten Pounds for

Hill. 12 Jac. Rot. 3027. 1 Brnl. 58. Br. Arbitrament 17. Hutt. 81. 9. Poſt. 218. Rolls. Abr. f. 254 Ap. 51. 5 Co. 77. b. 103. a. 10 Co. 131. b. Plo. 95. a. Dy. 216.

2 Cr. 854. Arbitrament on the one Side only, void.

8 Co. 98. b. 2 Saund. 65.

10 Co. 131. b. Dy. 25. b. 51. a. All. 10. 5 Co. 43. a. Pop. 134. 2 Cro. 354, 355. 3 Cr. 90. 1 Ro. 264. Littl. R. 2, 3. 265.

for Treſpaſs, it is good, for a Satisfaction implies a Diſcharge. And that is the Reaſon of the Judgment in Baſpool's Caſe. Now here in the Principal Caſe there is nothing awarded for the Defendant, and the three Pounds Ten Shillings appointed to be paid is not ſaid for what; ſo it can imply nothing, neither can it be holpen by any Averment; for the Arbitrament is conditioned to be in Writing, and yet indeed there was no Averment that the three Pounds Ten Shillings was awarded for any Cauſe certain: But if another Action were brought for the Treſpaſs, no doubt this Award may be pleaded with an Averment.

1 Roll. 254. There was no Judgment in this Caſe, for though I was clear, and am clear of that Opinion, and the reſt concurred, yet there was ſome barping after; and ſo it hung, and I think was compounded, for I heard no more of it.

(56) Inche *verſus* Roll.

Jenk. Cent. 296. Out of the Court of Wards came this Cauſe between the Attorney curiæ Wardorum at the Relation of William Inche, Committee of William French the King's Ward Plaintiff, and Andrew Roll Defendant.

Upon a Diem clauſit extremum, after the Death of John French, Father of the Ward, it was found that he held one Meſſuage and Twenty Acres of Land in Kettiſham in Cornwall of the ſame Defendant in Knights Service, and that the ſaid John French did likewiſe hold one Meſſuage and eight Acres of Land in Wharpſtone in Cornwall of the late Queen Elizabeth, as of her Manor of Entergen in Corwall by Fealty, and three Shilling Rent per Annum, & per quæ alia ſervitia Juratores ignorant.

Melius Inquirend. at the Common Law is but Additional to the firſt Office. Poſt. 73. Afterward a Melius Inquirend. was awarded upon Suppoſal, that the Land was holden of the King by Knights Service; upon which Melius Inquirend. it was found that he held the ſaid Meſſuage and eight Acres of Land in Wharpſtone of the Queen, by Knights Service. The Queſtion is, whether the Lands are holden of the King by Knights Service in Capite or not. It was ſaid for the King, that an Original Office found, as this Office is, upon the Melius Inquirend. would have made a Tenure in Chief. And it was alſo ſaid, that Trin. 12 Eliz. Dyer 292. it was reſolved; that where an Office was found that Lands were held de Domina Regina, ſed per quæ ſervitia Juratores ignorant, and thereupon a Melius Inquirend. was awarded, whereby the Tenure was found to be of a Subject. That now the firſt Office was Void, and the Melius Inquirend. was in the Nature of the firſt Writ of Diem clauſit extremum.

Co. L. 77. b.

But it was now reſolved by [Hobart] and [Tanfield] Coke being abſent, that in this Caſe, the Tenure by Knights Service of the Queen, found by the Melius Inquirend. ſhall be taken to be found of the Manor of Entergen, whereof the Reaſon is, that the Melius Inquirend. is in his own Nature, at the Common Law to be a Supplement to a Defect or Uncertainty of a former Office; and ſo here the Tenure being firſt found certainly of the Queen as of a Manor, and by ſome Service certain, and the Uncertainty only for ſome other Part, when the Melius Inquirend. comes it Perfects that, and ſo both make but one Office, and muſt be joined together. Now for the Caſe of the 12th of the Queen, it was nothing to the Purpoſe, for that is a Melius Inquirend. not at Common Law, but grounded upon the Statute of 2 E. 6. and Taking his Nature and Force from thence. Therefore the Reſolution is expreſly, that the Melius Inquirend. there, is as the firſt Office, and abſolute it ſelf by Senſe of that Statute, which is but in two Caſes mentioned in the Statute.

Holms

(57) Holmes *verſus* Twiſt.

1 Ro. 463, 468. Jenk. Cent. 294, 311. 2 Cro. 432, 433. Ro. 1 R. 265. Apr. 68. Yel. 76. 4 Co. 94. a. Plo. 6. b. Co. L. 45. b. Pop. 164. 1 Cr. 571, 34. Berkſhire. Trin. 12. Jac. Rot. 1758. V. fo. 68.

THomas Holmes brought an Aſſumpſit againſt John Twiſt, and declared that he was poſſeſſed of a Heap of Wood containing ten Tuns, and that Twiſt in Conſideration that Holmes would ſell and deliver him one Tun of the ſaid Wood, he would pay him for it within ſix Months, after the Rate that he ſhould ſell the reſt, and ſhewed that he ſold and delivered unto Twiſt the Tun of Wood, and after ſold unto one Collins the Reſidue after the Rate of 23 Pounds a Tun, and the Defendant paid him not the 23 Pounds according to the Promiſe, and thereupon Judgement was given for the Plaintiff in the Kings Bench, and now upon Writ of Error in the Exchequer Chamber, the Judgement was reverſed, becauſe the Plaintiff had not alledged that he had given Notice to the Defendant of the Sale and Price of the Reſt, being a Thing of his private Knowledge, and not like the Caſe of Bond to perform the Award. And ſome Judges of the Kings Bench allowed of the Judgment.

Note, the Difference is where the Payment is to be to a Stranger, and where to the Party himſelf. Cook 6 part *Booth's* Caſe. 35. b. Plo. 279. a. All. 24. 2 Co. 3. b. 4 Co. 82. b. 2 Cr. 493. Apr. 93. Notice muſt be of a Thing ſecret. Hutt. 80, 81. 8 Co. 92. b. Ro. 1. R. 286. 1 Cr. 133, 511. Cr. Jac. 432, 288. Ow. 108.

(58) Merifield's *Caſe.*

Curia Wardorum. Wife not advanced within 32 H. 8. 9 Co. 126. b.

EDward See ſold the Manor of Buckland in Kent, being holden in chief to Thomas Merifield and Dorothy his Wife, and to the Heirs of the ſaid Thomas to the ſame Uſe, then Thomas and Dorothy levied a Fine of the ſaid Manor to A. & B. to the Uſe of them during their Lives, the Remainder to the Uſe of Thomas in Tail, the Remainder to the Uſe of a Stranger in Tail, Thomas died: It was reſolved by [Hobart] and [Tanfield] that Dorothy was not to ſue Livery of any Part of the Land, for it was no Advancement to her from her Husband of his Lands within the Statute.

(59) Freak & Mabel Uxor *againſt* Edward Bindford.

Co. B. Devon. Brownlow Hill. 11 Jac. Rot. 30. A Briet varying from the Regiſter, but *equivalent.*

JOhn Freak and Mabel his Wife brought a Formedon in Remainder againſt Edward Bindford of 3 Meſſuages &c. in Alfrington, which Roger Linſey did give to Elizabeth Coxton, and the Heirs of her Body, the Remainder to John Piſing and his Heirs. Et quæ poſt mortem prædictorum Eliz. & Johan. Piſing præfat. Johanni Freak & Mabell fil. & hæred. Robert Piſing gen. fratris & hæred. Hugonis Piſing gen. fil. & hæredis præd. Johan. Piſing remanere debet per formam donationis præd. eo quod præd. Eliz. obiit ſine hæred. de Corpore ſuo exeunte, &c. The Tenant pleaded in Abatement of the Writ; that the Demandant ſhould by the Form of the Regiſter have ſuppoſed that the Meſſuages &c. poſt mortem præd. Eliz. & Johan. Piſing præfat. Johanni Freak & Mabell ut Conſanguin. & hæred. prædict. Joh. Piſing remanere debet per formam donationis præd. which Concluſion he hath not made. And it was ſaid, that the Writs of Formedon in Remainder to the Regiſter fo. 263, 244, and 246 were all ſo concluded: And of that Opinion was Juſtice [Warberton,] but [my ſelf] and [Winch] and [Nichols] held the Writ good enough, in as much as it appears to the Court, by the Pedigree as it is ſet down, that ſhe is and needs muſt be Coſen, and Heir unto John Piſing, ſo as it is but palma pro pugno, the ſame Thing more largely ſpoken, and the Form of the Regiſter may bear ſuch an Alteration, and therefore 5 E. 3. 35. and 7 E. 3. 47, 48. cited in the Regiſter.

5 Co. 88. 8 Co. 88. a. Co. L. 15. a.

Formedon in Remainder upon an Eſtate Tail limited to P. and K. the Remainder to F. in Fee, & quæ poſt mortem P. and K. to T. Son and Heir of F. ought to remain; And the Writ was adjudged good without laying expreſly the Death of F. though it were urged, that the Form of the Regiſter was ſo, becauſe the Laying of T. to be Heir of F. doth import as much.

And 11 H. 6. 20. in Formedon in Deſcender the Demandant made himſelf Heir unto every one, that had been inheritable to the Intail, though by the 8 Co. 88 b.

[8] Co. 88. b.

Regiſter he ſhould make himſelf Heir only unto them, that were ſeiſed by Force of the Intail, but yet the Writ was holden good, for now we muſt needs be Heir to all, that was ſeiſed, but he muſt not fail to make himſelf Heir to all, that were ſeiſed. And 2 H 6. 11. an Action of Waſte was brought, and the Writ was vaſtum in domibus & hominibus and allowed good though it wanted the Word exilium, which is the Word of the Regiſter, and proper.

(60) Richard Foſter Doctor of Phyſick *Plaintiff*,
Anne Jackſon Widow *Defendant*.

Co. Ent. 618.
Mo. 857. meſme Caſe
Roll. 1. Abr. f. 903.
2 Brownl. 311.
8 Co. 86. b. 87. a.
Trin. 10. Jac. Rot. 38.
14. *Sci. fac.*
Crompton. London.
This was adjudged againſt *Foſter* the Plaintiff. Trin. 13. Jac. upon open and large Agreement at the Bench, by Hobart, Nichols, Warberton, Winch to the contrary.

RIchard Foſter brought a Sci. fac. againſt Anne Jackſon Widow, and Miles Jackſon, Executors of the laſt Will and Teſtament of Thomas Jackſon containing, That whereas the Plaintiff in Mich. Term. 6 Jac. had recovered againſt the ſaid Thomas in the Common Pleas as well a certain Debt of 2300 Pounds, as 16 Pounds for Damages, why he ſhould not have Execution againſt them of the ſame Judgement: The Defendants plead that the Plaintiff ought not to have Execution againſt them of the Goods and Chattels of the Dead. For they ſay that the ſaid Plaintiff, after Judgement in the Life of the Teſtator, ſcilicet the 13 Day of Feb. in the ſaid ſixth Year did proſecute quoddam bre. ipſius domini Regis Capias ad ſatisfaciendum againſt the ſaid Thomas upon the ſaid Judgment, to the then Sheriffs of London directed retornable xv. Paſch. by Force of which Writ the ſame Sheriffs, before the Return thereof, that is to ſay, the 11 die Martii took the ſaid Thomas, and had him in Priſon, and kept him for the Debt, and Damages aforeſaid. And the ſaid Thomas ſo being in Execution after and before the Return of the ſaid Writ, died in Execution, and that the Sheriff returned the Writ ſo, and demanded Judgement, and the Plaintiff ſaith that the the ſame Sheriffs of London did not take the ſaid Thomas Jackſon, and him in Priſon, and under Cuſtody in Execution for the Debt and Damages aforeſaid had and detained by Vertue of the ſaid Writ of Capias ad ſatisfac. prout, &c. whereupon Iſſue was taken and the Jury find that the Sheriffs virtute brevis de Cap. ad ſatisfac. infra ſpecificat. non ceperunt, &c. ſed dicunt quod ceperunt, &c. virtute cujusdam brevis Capias ad ſatisfaciend. in recordo prædicto minime ſpecificat. in quadam exemplificatione inde conſect. & jurator' often' cujus tenor', &c. ſpecificat. And ſo ſet down the Writ of Alias Capias at large of the ſame Teſte, the ſame Return and all Things only it had not any Averment, that the Perſons and Judgement and all Things are the ſame, and conclude ſi ſuper tota materia, the Court ſhall think that that the Sheriff took him by Force of the Capias within mentioned, then they find the Defendants; if otherwiſe, then for the Plaintiff.

A large Caſe judged that a Man dying in Execution the Party his Heirs, Executors, *&c.* are no further chargeable.
And of Execution generally at large.

Execution and their Natures at large.

The Caſe depends upon two Points.

Firſt Point.

Firſt, whether the Verdict be found for the Plaintiff or the Defendant.

Second Point.

The Second, whether the Death of Thomas Jackſon in Execution be an abſolute Diſcharge of the Debt, againſt him, his Heirs, Executors and Adminiſtrators, ſo as one new Action or Execution can be had againſt them, or any of them.

Touching the firſt Point there ariſeth three Queſtions.

1 Firſt, whether the former Part of the Verdict be peremptory, which finds that the Sheriff took not Jackſon by Vertue of the Writ of Capias mentioned in the Plea, or whether the reſt that follows, that he took him by Vertue of an Alias Capias not mentioned in the Record, and ſets forth that ſpecially with Concluſion, if upon the whole Matter, &c. and leave it to the Court, to correct the firſt Part.

2 Next whether, the Alias Capias being underſtood of the ſame Cauſe, Perſons, &c. will maintain the Defendants Plea.

3 Laſtly, whether this Alias Capias ſhall be underſtood of the ſame Judgement mentioned in the Defendants Plea, becauſe the Verdict hath no Averment expreſſed, nor by the Word præd. &c.

And to the firſt Queſtion upon the firſt Point.

If the Verdict had proceeded no further, than to the general Negative, that the Sheriffs did not take him by Vertue of that Writ, it had been clear againſt the Defendant. To the firſt Queſtion upon the firſt Point.

But whereſoever a Jury doth begin with a ſpecial Matter, and after makes a general Concluſion upon it, contrary to that, which the Law and the Court do judge upon the ſpecial Matter found by them, or on the other Side, when they begin with a direct Verdict, and yet after deduce a ſpecial Matter, which is contrary to their direct Verdict, or in Law proves the Truth contrary to their general Verdict premiſed, and cloſed them up, with ſubmitting the Whole to the Judgement of the Court, as in this Caſe it is; in both theſe Caſes the ſpecial Matter makes the Verdict and over-rules the General. As for Example, Apr. 222. 4 Co. 42. b. Plo. 112. b. Regula 114. b. 111. a. 1 Cro. 75, 76. 1 Inſt 227. a. 12 Co. 15. Hut. 121. Cr. Car. 131, 174. Co. L. 227. a. 1 Cro. 212. 2 Cr. 55. 3 Cr. 481.

20 Eliz. Dyer 362. in Debt againſt Executors the Defendant pleaded plenie-ment adminiſter, whereupon Iſſue was taken, the Jury find that the Teſtator had made a Leaſe for Years of the Houſe and Implements of Houſhold rendring Rent and died, and that the Executors had received the Rent and concluded iſſint aſſets, yet the Court judged upon a ſpecial Matter it was no Aſſets, becauſe the Rent ran with the Reverſion, and ſo belonged not to the Executor. Hard. 347. 2 Ro. 701 2. 2 Cr. 212.

So Paſch. 22. Eliz. Dyer 370. One brought a Writ de plegiis acquietandis, and the Jury found that the Plaintiff was bound for the Defendant, as his Surety in an Obligation with him jointly and ſeverally, and that being impleaded he prayed a Plea, &c. and yet Judgment was given againſt the Plaintiff; for as this Caſe is, they were both Principal, and neither Pledge nor Fidejuſſor to the other: And this Action lies not but where one is named expreſly as Surety in the Bond, which was not ſo in this Bond.

And Paſch. 2 and 3 Ph. and Mar. Dyer 115. b. Debt upon an Obligation for Performance of Covenants, whereof one was that he ſhould do no Waſte, and Iſſue taken whether he felled 10 Oaks, it was found that he had not felled 20 Oaks, but he had felled 10, and it was adjudged for the Plaintiff, yet, if upon the firſt Point it had reſted there, it had been found for the Defendant. 2 Cro. 453. 1 Cr. 453. Co. L. 282. a. 3 Cr. 209. 2 Ro. 706. 2 Lev. 100. Yel. 148. 3 Cr. 882. 84. 1 Ro. 787.

Note, that 10 did not prove the Iſſue of 20 literally, but it proved the Breach clear within the Iſſue. Quære, if it had been Oaks for Aſhes or the like, for either had been Waſte, and the very Iſſue in Contemplation of Law is Waſte or no Waſte, and the reſt is a certainty of Form, ſo in Townſend's Caſe Plo. 111. poſt 72. & 3.

As the ſecond Branch of the firſt Point, whether the Alias Capias can be taken within the Iſſue. First, lay this for a Ground, that if the Jury find any Thing, that is meerly out of the Iſſue, that ſuch a Verdict, for ſo much is utterly void and of no Force, though it conclude in general, for or againſt the Plaintiff or the Defendant, whereof the Reaſon is plain, which is, that the Jurors are Tryers of Matter of Fact put in Iſſue between the Parties, and their Oath, which contains their Commiſſion is, that they ſhall truly try the Iſſue between Party and Party: And ſo is the ven. fac. ad triand. exitum non ad triandum jus, as in a Writ of Right, ſo that whatſoever they do try beſides the Iſſue is per non juratos, as a Cauſe judged by the Court, that hath no Juriſdiction of the Cauſe coram non judice, and utterly void, for a Verdict muſt not be to the Action, that might have been pleaded, but to the Iſſue, which is pleaded, and in their Charge. And if that other Point had been pleaded it might have had another Anſwer and Evidence. And therefore the Entry of the Verdict in the Record is, Quid ad veritatem de infra content. Jurati dicunt ſuper ſacramentum ſuum, &c. And ſo upon the Matter, if that extravagant Part of the Verdict be falſe, it is no Purjury, neither doth any Attaint lie upon it, for there is no Party grieved nor any Thing to be reſtored, neither can it be uſed as in Evidence in any other Tryal, becauſe there is no Redreſs if it be Falſe. The ſecond queſtion upon the firſt point. Verdict out of the Iſſue void. 11 Co. 13. a. Owen 91. 1 Inſt. 227. a. accord. 47. E. 3 19. a. 11 Co. 13. a. Palm. 535 145. 3 Inſt. 167. Yel 72.

And I hold it plain, you cannot juſtifie to call him perjured upon ſuch a Point being Falſe. And ſo it is concerning a Point of Diſcourſe by Judges out of the Point of the Judgement, it may be a judicious and ſtudied Opinion, and of ſome Authority, but it is no Part of the Judgement, for no Writ of Error lies upon it and therefore it ought not to preoccupate or prejudicate Plo. 96. a.

a

1 Cr. 174 Co. L. 227. a. 3 Cr. 546.

47 E. 3. 19. a.

a Judgement. And thereſore 39 E. 3. 38. a Writ of Annuity was brought upon a Preſcription, the Defendant traverſed the Preſcription, whereupon Iſſue was taken and found for the Preſcription. But further, the Jury found that there was nothing of Annuity behind, yet Judgement was given for the Plaintiff.

So 43 Aſſ. p. 1. in Aſſize the Defendant pleads himſelf a Villain, the Plaintiff replies that he was free and Iſſue taken upon it; the Jury found him a Villain, and added that the Plaintiff was ſeiſed and diſſeiſed by the Defendant as the Writ imported, and that the Lord of the Villain had not entered. And yet it was adjudged againſt the Plaintiff, for Jurors are bound to their Iſſues, but Judges have Power over the whole Matter, and that hath alſo his Bounds, as to the Matter within the Record not at large.

Verdict unformal. Apr. 262. 1 Cr. 7.

Plo. 92. b. Dy. 32. b.

But howſoever the Verdict ſeem to ſtray, and conclude not formally or punctually unto the Iſſue ſo as you cannot find the Words of the Iſſue in the Verdict, yet if a Verdict may be concluded out of it to the point in Iſſue, the Court ſhall work it into Form, and make it ſerve: And thereſore 47 E. 3. fo. 29. in a præcipe one came in and ſaid, that the Tenant was Tenant for Life, and prayed to be received for Reverſion. The Defendant on the other Side pleaded that the Tenant in the Action had Fee, whereupon Iſſue was taken that he had not Fee, and it was found that neither the Tenant nor he in Reverſion had ever any Thing; which is clean beſides the Iſſue, and againſt the Reaſon of the Receit. And it was adjudged that he ſhould be received, for by this Verdict it was found, that the Tenant had not Fee, which was all that was put in Iſſue, for both the Demandant and the Party praying Receit allowed Tenant to the Action, which muſt be at leaſt a Free-hold, and that being agreed by the Parties, the Jurors could not falſifie. And thereſore the Book 19 E. 2. F. receipt 178. being adjudged contrary I do condemn.

Cr. Car. 76. 174. 5 Co. 30. a. b. Plo. 87. a. Co. L. 125. b.

One takes benefit of a Verdict for another. Co. L. 126. b. 2 Cr. 134. Apr. 56. 8 Co. 133. b Ant. 14 Plo. 66. b. Sid. 76. Poſt. 164.

But on a contrary, where an Iſſue is well found it ſhall ſometime relieve a Stranger, as in the Caſe of Tilly and Woody 7 E. 431. where an Action of Treſpaſs was brought againſt two for taking of Goods, the one pleaded not guilty, and it was found againſt him, and the other pleaded, that the Plaintiff had given him the Goods, whereupon Iſſue was taken, and that found againſt the Plaintiff, and thereſore Judgment was given againſt him, for the Iſſue was well found, and the Action being the ſame and both the Defendants Parties to it, and the Court being apprized that the Title was againſt the Plaintiff, no Judgement could be given for him againſt the other. But if the Plaintiff had brought his Actions ſeverally againſt either Defendant (as he might) he would have had his Judgement though perhaps the Defendant might have been relieved by Audita Querela upon the other Judgement, tamen Quære of that.

Quære.

Now admitting that a meer Foreign Matter is void, yet in this Caſe to the ſecond Branch of the firſt Point, I am of Opinion that Alias Capias doth maintain the Plea of the Defendant, which is but thus. That whereas the Plaintiff had ſet forth his Judgement, and demands why he ſhould not have Execution againſt the Executor, the Defendant ſhews that the Plaintiff had ſued forth againſt the ſaid T. Jackſon in his Life quoddam breve de Capias, &c. a certain Writ of Capias ad ſatisfaciendum ſuper Judicium prædictum, &c. virtute cujus bevis, the Sheriffs took him and had him in Execution for the ſame Debt and Damage and that he died in Execution, &c. And the Plaintiff ſays that the Sheriffs virtute brevis præd. de cap. ad ſatisfaciendum prædictum Tho. Jackſon non ceperunt, and thereupon Iſſue is taken; ſo he denies that he was taken, virtute cujuſdam brevis de cap. &c:

Verdict intrudes an Al. cap. that was pleaded a Cap. general.

In every Act there is a Subſtance, a Body, a Principal, and there are certain Acceſſaries, or Accidents: And concerning this, it is a true Axiome, Unumquodq; maxime eſt id quod eſt principalius in ipſo, and thereſore Things are nominated ex eo quod ſunt per ſe, non per accidens. Now when the Subſtance is Capias whether it be the firſt Alias or pluries; thoſe are but Diſtinctions of Number in Order, there might have been more Colour, if he had pleaded

pleaded it an Al. Cap. where it was the firſt, for that had not been true in Words though in Subſtance, and to the Effect of the Execution it had been all one: But here as it is full to the Subſtance, ſo it is not untrue, nor ſo much as miſtaken in a Word, for it is a Capias with a little addition, that may be ſpared. And Capias is the Genus, and Genus continet plura quam ſpecies ſed ſpecies non continet plus quam Genus, 36 H. 6. 2. A Recognizance pleaded, the Iſſue, nul tiel Record, and the Recognizance, which was certified was upon Condition, and yet good, 36 E. 3. 5. In an Account the Defendant pleaded, that he accounted before R. and W. upon which Iſſue was joined, and it was found, that he accounted before R. only, and it was adjudged for the Defendant, 16 Aſſ. 19. In Aſſize the Tenant vouched, the Vouchee pleads, that heretofore the Plaintiff brought an Aſſize againſt his Father, who pleaded, that the Plaintiff did infeoff him by his Deed, and it was ſo found by the Aſſize, and he demanded Judgment, and upon Iſſue nul tiel Record, the Record was, that the ſaid Aſſize was againſt the Father and Mother, and yet adjudged no Failer; but the Verdict muſt not wholly depart from the Word of the Iſſue 40 Aſſ. 31. In an Aſſ. the Defendant pleaded the Deed of the Brother of the Plaintiff with Warranty, and the Plaintiff denied the Deed, and it was found not to be the Deed of the Brother, but the Deed of the Father, and it was adjudged by good Advice, as the Book ſaith, againſt the Defendant.

Plowd. 14. b.

Poſt. 13. 113.

And I am of clear Opinion, that if the Jury had found, that he had been taken with a Capias pro fine, or by a Capias utlegat. after Judgment, and the Plaintiff had prayed that he ſhould remain for his Satisfaction, that yet this had been againſt the Defendant; for though he were taken by a Capias, and were alſo holden ad ſatisfaciend. yet it was not quoddam bre. de Cap. ad ſatisfaciend. which is a kind of a Writ certain, yet it amounts to ſo much in Effect, and the prayer for his remanding is a kind of Taking of Charge of the Nature of the Writ. On the other Side, if the Sheriff had had this Jackſon in Execution by one Cap. at another Man's Suit, and then this Cap. had been delivered unto him, and he had alſo charged him with that, I hold that that would have maintained his Iſſue; for though he were taken before, yet this is a new taking in the Law.

Poſt. 209.

As to the third Branch concerning the Faults of Averment, to apply the Capias that is found to the Caſe in Queſtion, if this Uncertainty had been in the Plea of the Defendant, it would no doubt have made it Vicious, but being in a ſpecial Verdict, it muſt be taken according to their Intention, which is according to the Common Intent: Therefore when the Queſtion is, whether he were taken by Force of the Capias mentioned in the Plea, which is named without Addition, and they give their Verdict that he was not taken by Vertue of the Capias ad ſatisfaciendum within mentioned, but that he was taken by Force of an Alias Capias ad ſatisfaciendum, not mentioned in the Record at the Suit of the ſame Perſon, againſt the ſame Perſon of the ſame Teſte and Return of the ſame Sum of Debt, Damages and Judgment: It appears plainly, that they underſtand it to be the ſame, for it is againſt Senſe, that either the Jury would have made, or the Court have ſuffered a Special Verdict, as a Doubt, if this Alias Cap. had been upon another Judgment, or between other Parties.

The third Queſtion upon the firſt Point. 2 Saund. 97. per Keeling. Verdict ſpecial taken to common Intent.

If a Plea of a Capias may be maintained by an Alias Capias, which being the only Doubt, the Court muſt make no more Doubts; the Finding and Trial of the Matter of Fact, being only the Juries Office, and not the Courts, upon which Point, ſee Goodale's Caſe, Co. 5. fo. 97. where in an Ejectione firmæ per Goodale againſt Wyat, upon not Guilty the Jury concluded their Doubt upon Performance of a Condition by Payment of Money by Sir John Packinton to one Woodcliffe, but yet in making up their Verdict, they had given the Poſſeſſion to the Plaintiff by Leaſe, and laid the Entry upon him by Wyat, without any Title under Packinton, but that was not included, and ſo not regarded.

Poſt. 262. 5 Co. 97. a 1 Cr. 22. 130.

And Fulwood's Caſe, Co. lib. 4. fol. 65. where it was found, that one Recognovit coram Recordatore & Majore ſtapulæ ſe debere to another 200 Pounds, without ſaying, per ſcriptum Obligatorium, or ſecundum formam Statuti, and yet

Poſt. 262. Plo. 71. a Cr. Car. 363, 458 Syd. 27. 1 Cr. 209.

pet holden good and effeaual according to common Speech and Intent, and the Earl of Shrewsbury's Caſe, Co. lib. 9. fol. 51. where the Verdict ſaid, acceſſit ad locum uſualem to hold Court Baron: It was found that Sterne as Deputy to the Earl of Rutland acceſſit ad Villam de Mansfield ad uſualem locum ubi Cur. Baronis Manerii de Mansfield communiter tenta fuit ad cuſtod. il. Cur. and that he was diſturbed, &c. by Woodward Steward to the Earl of Shrewsbury, and holden well; for though this would not have ſerved in pleading, for it muſt have been pleaded that the Place was Part of the Manor, or holden of it at leaſt, where the Court was to be holden, pet it was allowed in Verdict. But now, if this were in a Demurrer upon Matter in Law, though the Parties will join upon ſome one Point, upon which if it ſtood alone, Judgment ſhould be given for the one Party; pet if upon the whole Record, Matter in Law appear why Judgment ſhould be given againſt the ſaid Party, the Court muſt judge ſo, for it is the Office of the Court to judge the Law upon the whole Record, and the Conſent of Parties cannot Prejudice their Opinions, nor quit them of their Office in that Point.

Plo. 71. a.

Demurrer upon a Point certain. 3 Co. 52. b. Plo. 85. a Ant. 54. 14. 8 Co. 133. b. 120. b. Styl. 403.

Plo. 69. a.

And therefore though Montague in Dive and Manningam's Caſe does ſtagger a little in that Point, upon the Book of 34 H. 6. pet in Concluſion he Reſolves, that the Court muſt of Office judge upon the whole Record.

The Verdict that the Sheriffs took him by Force of the Writ, not adding that they had him in Execution. Co. L. 227. a.

Now, though the Iſſue in this Caſe be, whether the Sheriff took him by Force of the Writ, and had him in Execution for the Debt and Damages, and the Verdict only finds, that the Sheriffs took him by vertue of the Al. Cap. and ſay nothing to the having and holding in Execution, pet it is well enough, for the Conſequence is neceſſary, becauſe they could not take him by the Writ, but he muſt be in Execution. And alſo, becauſe they Conclude their Verdict, that if the Sheriffs took him by Force of the Cap. within mentioned, then they took him in Form as the Defendants plead, which runs to the whole, as well for the taking as the detaining, keeping and holding in Execution.

Action confeſſed notwithſtanding the Verdict. Hutt. 35. Apr. 222. Dy. 167. b. 168. a. 95. b.

Poſt. 69. 3 Cr. 800. 2 Cr. 277. 3 Cr. 214. 227. Poſt. 198. 5 Co. 43. a. Dy. 272. b.

Nota, That the Dying in Execution was not put in Iſſue, but admitted, and therefore of that there is no Verdict, ſo that there is no Cauſe to argue it. But in reſpect that if the Death be not a Diſcharge, but a Reviver of a new Execution, then was the Plea a kind of Confeſſing the Action, and as the Plaintiff might then have demurred, ſo the Court ought now to judge for him, howſoever the Verdict be, except the Stat. of Jeofailes help the Defendant, like to 9 H. 6. 37. If in Debt the Defendant plead that he delivered the Deed as his Deed, to be delivered upon Condition perform'd, and not elſe; ſo it was not his Deed, upon which Iſſue being joined, and found not his Deed, pet it ſhall be judged for the Plaintiff, upon the Matter appearing to the Court to be confeſſed.

The ſecond great Point. 5 Co. 86.

Now, upon the ſecond great Point, which is the main Queſtion of the Caſe, whether a Man taken in Execution for Debt, and dying in Execution, the Debt be abſolutely diſcharged by his Death as againſt him: We would ſpeak a little largely, becauſe it is a great Conſequence, Execution being the Life of Juſtice, and neceſſary to be determined. And ſtrange it is, that it hath not been hitherto brought to Certainty, being a Caſe that muſt needs often happen.

Of Execution Perſonal.

And therefore, firſt of Executions in general, I mean of Executions Perſonal, as I may call them, for Debt and Damage, for of Executions upon real Actions, whereby Land is recovered, and Damages ſometimes withal, or of Executions upon Ejectione firmæ, I will not ſpeak.

3 Co. 12. a. 5 Co. 88. a. Br. & Gold. b. 118.

Executions therefore, as I call the Perſonal, are Levari fac. or Fieri fac. by Common Law; Elegit by the Stat. of Weſtm. 2 cap. 18. and Capias ad ſatisfaciend. by the the Common Law in Treſ. vi & armis being a direct and wilful Wrong. And by the Statute of 25 E. 3. in other Caſes.

For, at the Common Law, upon an Action of the Caſe againſt an Hoſt for Goods loſt in the Inn, or againſt the Sheriff for an Eſcape, no Capias lay, 42 E. 3. 11. and 42 Aſſ. Pl. 17. for it was but culpa ſometime levis, ſometime lata, a Negligence, but not a wilful Wrong.

There

There is alſo ſometimes Execution of the Body without a Capias ad ſatisfaciend. as where the Defendant is taken by Capias pro fine, for the King, which was alſo in Caſes of meer Wrong, or upon a Capias utlagat. for the King, after Judgment; in which Caſes the Plaintiff may pray the Defendant in Execution for his Debt, or may refuſe it. 5 Co. 88. a.

See the Form of the Entry of the Prayer of the Plaintiff in ſuch Caſe, that the Defendant may remain in Execution for him, for as much is implied in taking the Capias ad ſatisfaciendum ſcilicet an Election of that for his Execution, now Election implies Rejection of the reſt, for there is no Election of all, neither can the Body be taken for a Time, or for a Part as a Fieri fac. but it muſt be totally and finally during his Life. 5 Co. 87. b. Ant. 2.

Here I will conſider two Things.

Firſt, where Writs of Execution being ſued forth do utterly fail of their Effect, what is their Conſequence to other Writs of Execution. Of Writs of Execution ſued forth failing wholly of their Effect.

Next, when they be executed in Part, and not to the whole Demand. Of Executions having their Effect in Part.

Now touching the Relation of theſe Executions amongſt themſelves, and their Correſpondency.

If I take out a Capias or Fieri fac. and they take no Effect, I may have one of them after another, or an Elegit after both, if they fail, 15 H. 7. 14. 47 E. 3. 26. and therefore though 18 E. 2. F. Execution 132. as my Brother Nichols ſaid, and Fairefax, 15 H. 7. 15. be of Opinion, that after a Capias returned, non eſt inventus, the Plaintiff ſhall have no other Execution, the Law is not ſo. But if I take out an Elegit, and enter it of Record, and it be turned Nihil without Effect. Now the Queſtion is, whether A be utterly Remedileſs: And in this divers Books are Peremptory, that I am without Remedy, becauſe I have made (ſay they) my Election, and that entred upon Record, and therefore I can never reſort to any other; and to this Effect are the Books of 19 H. 6. 4. Newton, 5 E. 4. 41. a great Opinion againſt two Judges that had granted it. And it is cited 5 E. 4. 41. to have been ſo judged 30 E. 3. and 15 H. 7. 15. Fairefax accordeth, but alſo ſaith, that after a Capias, you ſhall not have an Elegit. But an al. Elegit, or an Elegit in divers Counties one after another, the Plaintiff may have, as the Books are, 21 H. 7. 19. 4 & 5 Phil. & Mar. Dyer 162. But theſe Books notwithſtanding (whereof there is never a Judgment but one, ſcilicet 30 E. 3. cited, which I find not) I hold the Law to be clean contrary. And that, where the Party takes an Elegit, and can have no Fruit of it, that he may reſort to another Execution, though the Election be entred of Record. Yet 18 E. 2. F. Execution 140. One had an Elegit into Norff. the Sheriff returned Execution of half 24 Acres, the Plaintiff prayed a new Elegit into Suffolk, and was denied all but Norfolk, which is an Error. Ant. 2. Poſt. 60. 2 Cr. 74. Debt, Br. 49. *Elegit*, whether it bars other Executions. 2 Cro. 339. Ant. 2. Dy. 299. b. Mo. 24, 341. Ben. 15. Ro. 1. 904, 905. Dy. 242, 288, 162, 341. 9 H. 7. 9. b. Co. L. 290. a. Mo. 24, 545.

And firſt for Authorities directly to the Point, 17 E. 4. 4. per Curiam, adjudged; after Elegit taken forth, the Year expired before it was ſerved, whereupon a Scire Facias was ſued out, and upon that a Capias by Judgment, notwithſtanding the Exception taken ut ſupra, for it was ſaid that Weſtm. 2. being Affirmative took not always at the Execution at Common Law. And it muſt be underſtood of an Elegit entred of Record, for otherwiſe there were no Queſtion or Ground for it. And 47 Edw. 3. Fitz. Execution 41. the Opinion of Piercey and Finchden is, that where an Elegit is taken out and not ſerved, the Plaintiff may have another Execution. And 50 E. 3. 4. when Kirton ſaid, that becauſe an Elegit was awarded, and was returned Nihil, yet no Cap. could be awarded, nor Capias pro fine ſerved. Belknap anſwered, they would be adviſed of that. It ſeems that the Conceit of this peremptory Iſſue of the Election entred hath been the Cauſe, that the Entry of latter Times hath been forborn of Record, 'till firſt it appear whether any thing can be had by the Elegit, and then to enter the Choice upon the Roll, when the Elegit is returned executed; but indeed when Execution is made, it is fit to be returned of Record, and filed, and not kept in the Attorneys Pockets to hide and return, when he finds his Advantage. Now for Reaſon of Law in this Caſe, there is none why a Man ſhould be Mo. 24, 50. E. 3, 5, 6. 3 Cr. 160. Poſt. 173. Plo. 112. Co. L. 115. a. Ante 2. 1 Leo. 51. Ro. 1. 505. 2 Cro. 3. Accord.

Plo. 55. a.

prejudiced by Ignorance alieni facti or caſus, and therefore if I plead Joint-tenancy in my ſelf, I muſt ſhew of whoſe Feoffment, not ſo of Joint-tenancy in a Stranger.

It is a captious Injuſtice to ſtick ſo in a Word to deprive a Man of his Due. 3 Cr. 160. 1 Ro. 905.

Next, it is miſtaken if it be conceived, that the Election, that is made and recorded, is to be taken an Election of the very Writ of Elegit. No, it is an Election of the Land, &c. of the Defendant Elegit executionem de medietate terrarum.

Turpis eſt pars, quæ non convenit cum ſuo toto. Now the general Rule of Election is clearly againſt the Conceit of the Writ of *Elegit*. 1 Inſt. 144. b. 10 Co. 128. a. Plowd. 457. a. 1 Roll. 226. Poſt. 130. 2 Co. 38. b. Co. L. 144. b.

The Words of the Statute of W. 2. c. 18. are, that it ſhall be in the Election of the plaintiff to have a Writ of Fieri fac. to the Sheriff, to levy the Debt upon the Goods and Chattels of the Debtor, or that the Sheriff ſhall deliver him all the Chattels, and one Half of the Land untill the Debt be levied. Out of theſe Words I note, that the Election is applied to the Fieri fac. as well as to the Elegit. Again, that of the two, the Caſe of the Fieri fac. is the worſt: For it is ſaid, that he may Elect the Writ of the Fieri Fac. but for the other that he may not Elect the Writ, but the Land it ſelf of the Debtor, to hold till he be ſatisfied, which ſuppoſeth Land to be choſen; for if there be none, the Choice is no Choice, and the Word Elegit is not the Matter, but the Act of Election, which is in both Executions alike. And therefore ſee Mich. 17 and 18 Eliz. Dyer 344. where one granted a Rent out of Land unto a Man and his Heirs without ſaying pro ſe & hæredibus, and then the Grantor died, the Grantee brought the Writ of Annuity againſt the Heir of the Grantor, who appeared and imparled till the next Term, and then the Plaintiff diſcontinued, and after diſtrained, and made Avowry, and then the Plaintiff in the Replevin pleaded the Writ of Annuity in Bar; whereupon it was demurred, and it was adjudged for the Grantee, for the Perſon of the Heir was not chargeable, and therefore the Election was Void, and none in Law, and therefore per curiam, though they had proceeded to judgment in the Writ of Annuity; yet the Land migt ſtill have been charged.

But now in the ſame Caſe, if the Writ of Annuity had been brought againſt the Grantor himſelf, it would have been bound for ever, and ſo it would have turned the Rent-charge in Fee-ſimple into an Annuity, only for the Life of the Grantor. So you ſee that the Election ſtands not in the Choice of the Writ of Annuity, for that may be idle and miſtaken, but of the Annuity it ſelf. when it is in Being.

Adjudged in 45 E. 3. 26. and 36 H. 9. 3.

In Raviſhment of a Ward, where the Jury found the Infant within Age, and aſſeſſed Damages to one Hundred Pounds, if he were not married; but if he were married, to three Hundred Pounds; the Plaintiff could not have a double conditional Judgment, although he could not know whether he were married or not, and therefore he was inforced to make Election, and yet if he chuſe Judgment of Marriage, and the Hundred Pounds, if the Sheriff return that he is married, he ſhall have Execution for the three Hundred Pounds, for the Election of the Marriage is Void, 36 E. 3. F. Gard. 11. 33 H. 6. 14. If the Tenant Infeoff his Heir within Age, and the Lord receive of him his Services in the Life of the Father, yet he may take him in Ward, after the Death of the Father, otherwiſe it is if he receive his Services of him, after the Death of the Father, for there are now divers Things to make Choice of, not ſo before.

Mo. 48.

Thus far of Writs of Executions, that being ſued forth fail of their Effect wholly.

Now of Executions, that have their Effect in Part.

Ben. 177. Yd. 91, 184. Br. Execution, 132.

If upon a Fieri fac. the Debt be ſatisfied in Part, the reſt may be ſerved, either by Capias or Elegit, 14 E. 4. 11. 47 E. 3. 26. and 14 H. 7. 28. But in that Caſe one had ſued forth a Fieri fac. and before the Return he prayed a Capias, but it was denied him, till it ſhould appear upon the Return of the Fieri fac. whether he had Execution by that, ſo it ſeems that there was ſome Entry of it of Record. So there is a kind of Bar upon the Electing of the Fieri fac. if it may be ſerved, for there ſhall not be two ſeveral kinds of Executions out at once.

2 Cro. 358.

1 Ro. 905. Syd. 184. Yel. 180. 2 Cr. 246, 338.

And upon the Elegit, if there be no Execution but upon Goods, becauſe there is no Land, and the Goods appear not enough, I am of Opinion he may have a Capias, for now it is in Effect but a Fieri fac. though the Word be Elegit.

But

But if there be Land extended, it is otherwiſe, and yet Quære, if the Debt be 40 Pounds and nothing extended, but a Leaſe for three Years at five Pounds a Year, or the like, for then, as to that that remains, the Elegit fails, as in the other Caſe, where nothing at all is to be had. Quære, 2 Cr. 339. Mo. 341.

But if a Capias be executed, that is in Law ſufficient for the whole Debt; for Corpus humanum non recipit eſtimationem, ſo as if you take it all, you muſt take it for the whole Debt. 5 Co. 87.

Now to the main Queſtion:

Firſt, it is agreed on all Sides, that whereas the Elegit or Fieri fac. are both Executions and Satisfactions to all Purpoſes, and againſt all Perſons, the Capias is a full Execution, as the Book 22 Aſſ. 43. ſays; but it is not a perfect Satisfaction in Nature to all Purpoſes, and againſt all Perſons. 2 Inſt. 395. Execution, Br. 79.

Now how, and to what Purpoſe, and in what Caſes it is not a Satisfaction, is the Queſtion,

Firſt, I agree clearly, that it is not an actual Satisfaction, no not between the Parties, according to Hillaries Caſe, 33 H. 6. 47. where one was bound to ſatisfie for Goods that he had imbezeled: And in Debt upon an Obligation, he pleaded, that upon a Suit for thoſe Goods he was taken in Execution for the Damage, and it was adjudged no Plea. But this is nothing to the Caſe in Queſtion; for without Doubt it is no Satisfaction to common Speech, nor to a Foreign Plea. Br. Condition, 14.

But the Queſtion is, whether it be not quaſi Satisfaction, or Satisfaction in Law to that very Suit. 5 Co. 87. a.

For if an Executor releaſe a Debt, or diſcharge one in Execution, it ſhall be accounted in Law Aſſets as received. 3 Leo. 53. Poſt. 66. Aſſets, Br. 1.

Again, it is no Satisfaction clearly, as to bar me to ſeek Satisfaction againſt another, liable to the ſame Debt or Damages. And therefore, 29 H. 8. Brooke Execution 132. 4 H. 7. 21. 20 H. 6. 11. 33 H. 6. 47. 14 H. 4. 19. and Blomfield's Caſe principally, Co. lib. 5. fol. 86. B. and Jones and Williams Caſe cited there are all clear Law, and yet make nothing to the Caſe in Queſtion. For 4 E. 4. 38. 5 E. 4. 4. being all to one Effect. 2 Cr. 338.

Again, I am of Opinion, that if two be bound jointly and ſeverally to me, and I ſue them jointly, I may have a Capias againſt them both, and the Death or Eſcape of the one ſhall not diſcharge the other. Poſt. 60. 5 Co. 86. b. 2 Cr. 338, 339, 532, 694. 1 Cr. 75.

But I cannot have a Capias againſt the one, and another Kind of Execution againſt the other, becauſe though they be two ſeveral Perſons, yet they make but one Debtor, when I ſue them jointly; but if I ſue them ſeverally, I may ſever them in their Kinds of Execution, for though the Obligation be but one, yet the Originals, the Suits, Pleadings, Judgments, and Executions are ſo divers, as if they were upon ſeveral Obligations. But yet ſo as if once a very Satisfaction be had of one, or againſt the Sheriff upon an Eſcape of one, the reſt may be relieved upon an Audita Querela. Several Kinds of Executions upon one Obligation, as a Capias againſt another, where they are not ſued jointly. Quære, if I ſue them by one Writ, but ſeveral Precipes. 4 E. 4. 40. 6 Co. 40. b. 2 Cr. 338. N. B. 246. B. Yel. 67.

But now ſingly out of the very Point, I hold that a Capias ad ſatisfaciend. is againſt that Party as not only an Execution, but a full Satisfaction by Force and Act, and Judgment of Law; ſo as againſt him he can have no other, nor againſt his Heir or Executor, for theſe make but one Perſon in Law. 5 Co. 87. a. utra. 2 Cro. 74, 136. 2 Cro. 143. adj. Accord. 7 H. 6. 7. a. Plo. 441. a. 1 Cr. 240. 1 Roll. 903. Mo. 857. 3 Cr. 850. Mo. 858. 1 Cr. 255. 1 Reaſon.

For where the Law gives three or four Kinds of Executions, not all together, but by way of Choice, whereof the Capias ad ſatisfaciend. is one; and when the Body is taken, it is a full Execution, and cannot be for Part (as a Fieri fac. may be) It is an Election of it ſelf of that Kind of Execution, and ſo a Renouncing of the reſt as well as an Elegit, though it uſe not the very Word, &c. For if the Defendant had Lands and Goods, when the Plaintiff took the Body; he made a plain Preferment of that Execution before the other. And if they came after, he prevented his Choice by Haſte, which Expedition alone is a great Advantage in Execution. 5 Rep. 86. b. utra. 87. a.

And it is eſpecially to be noted, that the Debtor hath not the Choice to put the Creditor upon the Execution; for then it had ſome Colour of Reaſon, but the Choice is taken by the Creditor.

2 Reaſon. 1 Ro. 901. Mo. 57. Cr. Car. 255.

If the Party in Execution eſcape of his own Wrong, yet the Plaintiff cannot have againſt him any other kind of Execution, nor againſt his Executors, whereof the Reaſon is, becauſe, that when he hath begun, and choſen the Body, he can never reſort to any other Execution againſt the ſelf-ſame Party; but the Reaſon is not becauſe he hath an Action againſt the Sheriff for ſo he hath in the former Caſe of ſeveral Executions againſt ſeveral Debtors by one Obligation, as well after as before the Eſcape.

Cr. Car. 75. Ant. 59. 1 Cr. 240. Ant. 57. I. 5 Co. 86. b. Ant. 2. 5 Co. 92. b.

And therefore if he take one in Execution, who Eſcapes, he hath Choice to take another, or to get Satisfaction from the Sheriff upon the Eſcape.

5 Co. 87. N. B. 240. B

But now as to the Party himſelf, though he make an Eſcape (which is his own wilful Wrong) yet the Plaintiff can have no other Execution againſt him. And if he ſaith he hath Remedy againſt the Sheriff, yet that may fail, either by Death, or Diſability of the Sheriff. And by the ſame Reaſon, that there is Difference between the ſame Party and another in Caſe of Eſcape, I hold it much more Reaſonable in the Caſe of Death, 41 Aſſ. Pl. 15. One in Execution for Debt eſcaped, and the Sheriff died, whereupon the Plaintiff prayed a new Capias againſt the Priſoner, and had it in that Caſe of Miſchief; but other Execution I hold he could not have had in that Caſe.

3 Co. 52. b. Poſt. 202.

When the Party taken in Execution makes a wilful Eſcape, and that againſt the Keeper's Will, yet the Plaintiff can take no other Execution; this cannot be in the Favour of the Priſoner, for he is the only Wrong doer both to the Parties and to to the Law, and is the Cauſe why that Execution is defrauded, and ſo gives Cauſe of another.

There is no Cauſe to impute any Fault to the Plaintiff, why he may not now take a new Execution, ſince by the Defendant's Fraud he could not reap the Benefit of this.

Likewiſe there is no Cauſe to quit the Offendor, and to lay the Charge upon the Sheriff, who conſented not to the Eſcape, whom the Plaintiff would free by taking another Execution againſt the Party himſelf.

Therefore there can be no other Reaſon of that Poſition, but that the Capias executed, and the Body taken, ſtops, as againſt him all other Executions but it ſelf and the Conſequence of it, which is the Action of Debt, or Action upon the Caſe upon the Eſcape.

5 Co. 87. b.

Now in the Principal Caſe, all theſe Conſiderations move mainly, and are without Exception more clear and juſt to quit the Defendant, being in no Fault, and to ſatisfie the Plaintiff by his own Choice, whereof he hath had the full Effect directly, that is, his Body.

3 Reaſon. Plo. 440. a. 5 Co. 12. b

It is a Prerogative to the King, to have Execution of Body, Lands and Goods, not communicated to the Subject, but in Caſe of Stat. Merchant and Staple, and Recognizance of that Nature, which is by the Statute Law. And therefore the Caſe put in Blomfield's Caſe; that where the Party was taken in Execution upon a Statute and died, and yet Execution was had againſt Goods and Lands after, is nothing in this Caſe, for they were all due at the firſt, and therefore might be taken at once or ſeverally. But if this Opinion ſhould hold, a Man, beginning with a Capias, may be ſure upon Death to end with a Fieri fac. or Elegit.

5 Co. 86. b. 87. b.

And if ſo many be Bound, and all taken in Execution, upon the Death of every one a new Execution may be againſt the Executor; which is Abſurd and full of Miſchief.

4 Reaſon. *Statutum eſt omnibus ſemel mori.*

When the Plaintiff took him in Execution, as he choſe that his beſt Remedy, ſo he could not but foreſee that he might die under his Hand, ſo it was his Folly to chuſe that kind of Execution, which was executio caduca.

The Heriot by Law is Optimum Animal in rei veritate, but if the Lord will, he may take the worſt. And as it was ſaid by a Father, that loſt his Son in Battel, Novi me genuiſſe mortalem, ſo here Foſter may ſay, novi me cepiſſe mortalem.

5 Reaſon. 21 Jac. cap. 24.

Now ſince the Execution of the Body ſtands as a Satisfaction between the ſame Parties, while the Party lives, there is no Senſe but that the

Party yielding himſelf to the Execution, and ending his Life in it, and the other accepting it, and ſo both agreeing upon it, it ſhould make a final Diſcharge touching himſelf; for it cannot be truly ſaid, that the Defendant is in Fault, when being not able to pay his Debt inſtantly, he yields his Body and Lands and Goods, if he have any, to the Courſe of Law and his Creditors Choice, and endures with Patience without Flight or Eſcape after the Creditor choſe his Body: For it is a Fancy, to ſay, the Debtor ought to pay his Debt, for the Law muſt be the ſame, whether he were able to pay or not. 1 Cr. 75. 5 Co. 87. a. b. The Example of the Fellow-ſervant, that made his Suit, *Have Patience with me, and I will pay thee all.* 1 Cro. 240.

And of all Executions, that of the Body in Law is eſteemed the beſt, as alſo in Law of Nature the beſt, and moſt forcible, and therefore, 7 H. 6. 6. by the Opinion of Cotiſmore. If two Executors have Judgment, and the one pray a Capias, and the other a Fieri fac. the Capias ſhall be awarded as beſt for the Teſtator. And the Common Law gave not that Execution, as being too hard and heavy, but only in the Caſe of wilful Wrong, vi & armis, for which none was thought too hard. And therefore Barons were not ſubject to it, but upon great Contempts; nor yet, ſince the Statute, 25 Edw. 3. though they be not ſpecially exempted. 6 Reaſon. 1 Cr. 205.

Though the Plaintiff have no direct Intereſt in the Body, as in his Ward or Villain, to buy or ſell it, yet he hath Intereſt in it for Liberty or Reſtraint by Ward, till he pay ultimum quadrantem in ſalva & arcta cuſtodia. Read the Caſe in the 4 Chap. of the ſecond Book of Kings, the Creditors would take the two Sons for Bond-men.

Although in Treſpaſs vi & Armis at the Common Law againſt a Baron a Capias lyeth not, nor after by the Equity of the Common Law upon the Statute, becauſe the Eſtate of a Baron is intended ſufficient: Yet 11 H. 4. 15. in homine repligando, againſt Dame Spencer a Peer of the Realm, viz. a Baroneſs Born, it was granted, becauſe it was an high Injury to the Perſon, whom ſhe eloined. Alſo the Common Law holdeth the Body the greateſt Pain and higheſt Coercion. 6 Co. 52. b. 2 Le. 174

And the Reaſon is apparent, for as Chriſt ſaith, The Body is of more worth than Raiment. And as it is ſaid in Job, Pellis pro pelle, and all that a Man hath he will give for his Life, but touch his Fleſh or his Bones, &c. Now Impriſonment toucheth both, in ſalva & arcta cuſtodia.

Now touching the Caſe that is agreed, 14 H. 4. 4. 15 E. 4. 10. That where a Man takes Diſtreſs for Rent, and upon Avowry hath return irreplevisable, that if a Beaſt die in the Pound, that now he may diſtrain a new, and that this ſhould much Convince the Caſe in Queſtion: Ye, that looks near unto it, ſhall find it nothing like; for beſides that, there is no Compariſon between the Body of a Man and Beaſt, touching Valuation, and ſo touching Satisfaction, it is to be noted that the Sum of Rent, or the Valuation of the Damage is not adjudged to the Avowant in the Replevin, and then the Beaſt taken by him in Execution, as in the Caſe in Queſtion, but where he had taken the Beaſt by Diſtreſs, and that is replevied from him: Now upon the Right of diſtraining appearing, the Beaſts are reſtored unto him, in that State, as they were before, to remain with him as a Diſtreſs lawfully taken by Judgment of the Court, and not to be replevied, ſo this hath no Colour of an Execution, but is only the Effect of the Agreement of the Parties, or Act of Law; be it in Rent-ſervice or Rent-charge, or Damage-feſant, that he may Diſtrain and Retain, till the Rent or Damage be ſatisfied; ſo that even as if the Beaſt had died before Judgment, he migt have diſtrained again, ſo after Judgment, for it is alike in both Caſes. It is a more fit Compariſon to ſpeak of Beaſts taken in Execution by *Fieri fac.* and dying, though there be a Property, which is not in the Body of a Freeman.

But the Body of a Free-man cannot be made ſubject to Diſtreſs or Impriſonment by Contract, but only by Judgment. 5 Co. 64. a.

But in this Caſe the Debt is adjudged, and the Body taken by a Warrant of the Court, and of the Law in Execution for it.

Paſch. 43 Eliz. Rot. 88. Anne Williams brings a Scire fac. againſt Edmund Cuttryes and Conſtance his Wife Adminiſtratrix of Richard Lamb, to have Execution of Eighty eight Pounds Debt and Damages recovered againſt Lamb. The Defendant pleaded, that the Plaintiff by Capias ad ſatisfaciendum, had *Scire fa.* 2 Cro. 143, 136. 3 Cr. 850.

A Man dies in Execution, his Adminiſtrators are no further chargeable.

had taken Lamb himſelf in Execution, in which Execution he died, and demanded Judgment, and the Plaintiff demurred, Hill. 4 Jac. It was adjudged againſt the Plaintiff in the King's Bench, which was long after Blomfield's Caſe either argued or publiſhed, it being argued 38, 39 Eliz. and publiſhed Tertio Jacobi.

(61) Spicer *and* Read. Trin. Term. Anno 13 Jac. Regis.

Star-chamber. Perjury not Legal, yet puniſhed in Star-chamber.

MAſter William Spicer was ſentenced in Star-chamber, at the Suit of Thomas Read Eſquire, to four Hundred Pounds Fine, for that he had taken Oath before Baron Snig according to Order taken upon the Commiſſion of Defective Titles, that John Spicer his Father was ſeiſed of a Manor of ſome Eſtate of Inheritance, if his Majeſty's Title hinder not, whereas in Truth the Manor was then the ſaid Read's, and ſo obtained the Letters Patents from the King: But this was puniſhed, not as a direct and judicial Perjury, but as a Miſdemeanor in Abuſe of the King's gracious Commiſſion to the Diſturbance of Poſſeſſions, which was inſtituted and intended for the quieting of Poſſeſſions in Supply and Imitation of the Statute of

11 Co. 98.

32 H. 8. cap. 9. whereby Men are forbid to buy and ſell Titles, ſaving to ſuch, as are in Poſſeſſion of the Lands. And becauſe Read the Plaintiff had been ſued and troubled by Colour of his new Patent, a Hundred Marks Damages was given to him, and the Sentence ordered to be publiſhed through the Kingdom.

(62) Park *and* Percival *verſus* Evans Under-Bailiff.

Star chamber. Breaking an Houſe upon private Proceſs. V. fo. poſter. 263. and 264. 1 Cr. 528. Dy. 37. a.

HUgh Evans an Under-bailiff of Stepney and others were fined at the Suit of Parke and Percival in two Hundred Pounds a piece, for that they upon a private Proceſs at the Suit of one Brocklesbury againſt one Porter, who lay in the Houſe of Parke, came and knock'd at Parke's Door, whereupon Parke's Wife came to the Door, and opened it a little to ſee who was there, and they preſently with their Swords drawn ruſht in upon her whether ſhe would or no, and bare her down, and brake open the Chamber Door, where Porter lay, and brake alſo Percival's Houſe adjoining to it, to get Inſtruments to break Doors withal, and did hurt divers in the Houſe. And my Lord [Chief Baron] and [my ſelf] held the firſt Entry Unlawful, for the Opening of the Door was occaſioned by them by Craft, and then uſed to the Violence, which they intended.

Sheriff fined for Outrage in executing Proceſs. Poſt. 263, 264. 2 Cr. 556. Yelv. 28. 4 Leo. 41. 5 Co. 91, 90. b. 92. b. 93. a.

(63) Barrow *againſt* Lewellin.

Star-chamber. Libel by privy Letter to the Party himſelf. V. fo. 215. &c. Co. 12. 35. 5 Co. 125. Mo. 142.

PAul Barrow preferred a Bill in the Star-chamber againſt Maurice Lewellin, for writing unto him a deſpiteful and reproachful Letter, which, for ought appeared to the Court, was ſealed and delivered to his own Hands, and never otherwiſe publiſhed. And it was reſolved, that though the Plaintiff in this Caſe could not have an Action of the Caſe, becauſe it was not publiſhed, and therefore could not be to his Defamation, without his own Fault of divulging it. And all Actions of that kind do ſuppoſe in auditu quam plurimorum propalavit, &c. Yet the Star-chamber for the King doth take Knowledge of ſuch Caſes and puniſh them, whereof the Reaſon is, that ſuch quarrellous Letters tend to the Breach of the Peace, and to the ſtirring of Challenges and Quarrels, and therefore the Means of ſuch Evils, as well as the End, are to be prevented.

4 Co. 15. a.

4 Le. 240.

(64) Martin *verſus* Marſhal *and* Key.

MArtin brought an Action of Falſe Impriſonment againſt Marſhal and Key, who juſtified and ſaid, that York was a City by Preſcription Incorporate, by the Name of Mayor, Aldermen, and Commonalty, and that they had had Time out of Mind a Court called a Chancery Court, for all cauſes of Equity ariſing within the City between Citizens, to hear and determine by Bill and Anſwer. And that the Mayor had always uſed to direct Precepts for Appearance and Contempt of Orders, and to impriſon for Contempts of Orders, and to proceed according to the Courſe of Chancery; and then ſhews that another, one Marſhal preferred a Bill before Marſhal the now Defendant being then Mayor, and the Aldermen, and tells the Effect, whereupon the Defendant being ſummoned appeared, but would not anſwer, and thereupon an Order was made againſt him, that he ſhould anſwer or be committed; and becauſe he did wilfully ſtill refuſe to anſwer, Commandment was given by the Mayor to Key the other Defendant, being Serjeant at Mace to take him; who did ſo, and brought him into the Court before the Mayor and Aldermen, where he was in open Court committed for his Contempt, which Taking and Committing was the ſame Impriſonment, whereupon the Plaintiff demurred, and it was adjudged againſt the Defendants upon one groſs Fault; that where the Preſcription was for Precepts to be directed (which muſt be underſtood by Writing) the Precept to Key the Defendant, here whereby the Plaintiff was taken, was by Word. And if that were Void, which is made Part of the Cauſe of the Judgment, the whole Plea is vicious, though the Committing in open Court were good.

False Impriſonment. Co. B. Court of Chancery at York, whether it may be by Preſcription. 2 Ro. 109. Godb 262. 12 Co. 114. Hutt. 59. Conuſans Br. 46. 4 Inſt. 245.

Monſtrans & Br. 63.

But in the handling of this Caſe it was argued by Serjeant Hitcham, that the Subſtance of the Plea was faulty, for he argued that a Court of Equity could not lie in Grant, much leſs in Preſcription, being a Juriſdiction to be derived from the Crown, and ſo he ſaid it was reſolved by Popham, Anderſon, Gawdy, and Walmſley, that the King could not grant to the now Queen to hold a Court of Equity, and that alſo it could not be by Preſcription, for the King cannot Grant any thing in Derogation of the Common Law, but tenere placita, according to the Courſe of Law may be granted and preſcribed, and the Chancery in Cheſter and Durham are Incidents to a County Palatine, which had Jura regalia. And London and the Cinque Ports have Acts of Parliament for them. And indeed I hold this to be a greater Queſtion, and of great Conſideration to be admitted, that a Court of Equity ſhould ſtand upon Grant or Preſcription only. For though it be true that the Court of Chancery hath always been, and ſo in Effect ſtands by a Preſcription, yet that is not well reaſoned, for in pleading of any Thing done in Chancery, you do not begin your Plea with a Preſcription, as in theſe Inferior pretended Courts, but you plead a Thing done in the Court of Chancery, as you do all Things done in the Courts of Common Pleas, or King's Bench: whereof the Reaſon is, that they are Fundamental Courts, as ancient as the Kingdom it ſelf, and known to the Law, for all Kingdoms in their Conſtitution are with the Power of Juſtice both according to the Rule and of Law and Equity, both which being in the King as Soveraign, were after ſettled in ſeveral Courts, as the Light being firſt made by God, was after ſettled in the great Bodies of the Sun and Moon. But that Part of Equity being oppoſite to regular Law, and in a Manner an arbitrary Diſpoſition is ſtill adminiſtred by the King himſelf and his Chancellor, in his Name ab initio, as a ſpecial Truſt committed to the King, and not by him to be committed to any other. And it is true, that the one is bound to Rules, the other abſolute and unlimited, though out of Diſcretion they entertain ſome Forms, which they may juſtly leave in ſpecial Caſes.

Noy. 147. 12 Co. 51. Preſcription, Br. 18. 4 Inſt. 87. 242. 2 Inſt. 71. Dav. 72. a. Prerogative, B. 15. Juriſdiction, Br. 105.

2 Inſt. 23. 9 E. 4. 51. Bracton, 108. Mirror, 8.

Arundel

(65) Arundel's Case. Replevin.

Visne from two places in respect of two Defendants. 1 Brnl. 174. 2 Ro. 667. Post. 66.

IN a Replevin by Arundel against two, for taking his Beasts at a place called Horsedown in Southwark, one of the Defendants pleaded non cepit, whereupon Issue was taken, the other pleaded that the Place, where, lay in the Parish of St. Olave's in Southwark, and was the Freehold of the Governours of the School of St. Olaves, and so made Cognizance. The Plaintiff replied, claiming a Way over the Place to another Place in the same Parish, and Issue taken upon that Prescription. And one Venire fac. was awarded for trial of both Issues from Southwark, and the Parish of St. Olaves. It was excepted that it should have been only de vicineto Parochiæ, because the Place appears to lie there, and therefore that was the nearest Venue to the Fact. But the Court ruled the Venue well, for though it ought to have been so, if both the Defendants had joined in the Plea of Prescription, because that then they had both agreed that it had lien in the Parish; yet because the one Issue was Non cepit to the Place, as it was laid in Southwark generally, and he was not bound by his Fellows Confession that it lay in the Parish, and there was but one Ven. fac. therefore that must fit both their Cases, which was to have it both from Southwark, and from the Parish in Southwark, and it was also ruled that it is not shewed that the Governors were incorporated, for it shall be presumed by the Plea, 19 H. 6. 80. though 20 E. 4. 2. where one brought Debt by Name of Alderman as Successor, be otherwise, for a Succession in one Person of Chattels will not be presumed without special Allegation, except in Case of Abbot or Prior, or the like Corporation known in Law to rest in one Person, as well for Chattels as Inheritances, for otherwise Bishops, Deans, Parsons, Vicars, and the like cannot take Obligation to them and their Successors, but they will go to the Executors. And Lisney in the Habeas corpus was made Listney, to agree with the Ven. fac. though the true Name was Lisney, because they sound so like.

2 Cr. 87.

8 Co. 133. a. 1 Cr. 46.

Plea of Corporation without shewing the Creation of it, v. 9 E. 3. 19 chap. sans Dean 22 Ass. 67. Commonalty sans major, 7 E. 4. 89. *probis hominibus*. Noy. 110. 4 Co. 65. a. Co. L. 46. 22 Co. 105. 4 R. 65. 7.

Replevin. Goldborough.

(66) Johnson *versus* Throughgood. Trin. 22 Jac. Rot. 1734.

1 Brnl. 177. 2 Ro. 708. Br. Estate, 57. Election in Issue for sundry Forms. Prescription to tether Horses.

IN a Replevin by Johnson against Throughgood Issue was taken whether one, and all whose Estate he had in a Manor, had used to tether their Horses to Stakes in a Place called the Brook, ab & post. festum Pent. annuatim; and the Verdict found that they had used to do in vigil. Pentecostes in festo Pentecostes die lunæ in septimana Pentecostes, aut Postea ad suum libitum annuatim. And it was adjudged for the Parson that did prescribe, and that the Verdict did maintain the Prescription, as it was pleaded, because it was more Large, and also gave a Choice.

(67) Webb.

Award Process to the Coroner or Sheriff cross. Yel. 15. Cr. El. 894. Co. L. 1584. Mo. 422, 356. Cr. El. 574.

ACtion was brought by A. B. against Webb, and Issue joined, and then the Plaintiff made Surmise, that he was Bailiff and Servant unto Grimstone, the Sheriff of Essex, and therefore prayed Process, &c. to the Coroners, which being confessed, the Entry was & ei conceditur. And yet afterwards the Ven. fac. went to the Sheriff, and the Jury past for the Plaintiff. And this was moved in Arrest of Judgment by Serjeant Towse, and the Question was whether this Grant to the Coroners being meerly in Favour of the Plaintiff to avoid his Delay by Challenge may not as well be left after it is granted, as before have been required at the first.

Yel. 15.

Next, whether this be not a Mis-awarding of Process remedied by the Statute of Jeoffailes.

Green

(68) Green *verſus* Armſteed. Trin. 12. Jac. Rot. 1703.

Norfolk. Goldsborough.

IN Treſpaſs by Robert Green againſt William Armſteed for Lands in Clay, the Caſe was thus, that Ralph Green had Iſſue William, and William had Iſſue Robert the Plaintiff, and Thomas his younger Son, and being ſeiſed of theſe Lands in Clay, and of certain Lands in Stukey, did make his Will concerning the ſame as followeth. Item, I will that William Green my Son ſhall have my Houſe and Land in Clay for the Term of his natural Life, and then to remain to Thomas Green his Son, except the ſaid William Green do purchaſe another Houſe with ſo much Land, and ſo good in Value as the ſaid Houſe and Land in Clay, for the ſaid Thomas his Son, and then the ſaid William ſhall ſell the ſaid Houſe and Lands in Clay as his own. And the ſaid Thomas Green ſhall pay or cauſe to be paid to his Siſters, 10 Pounds of good Engliſh Money in Form following, that is to ſay, to each of them 20 Shillings by the Year, until the ſaid Sum of 10 Pounds be fully contented and paid to the Siſters.

Deviſe land to A. except B. purchaſe as much for him, and then may ſell the other. Cr. Jac. 599.

Cr. Car. 158.

Item, I give my Land and Houſe in Stukey and elſewhere to Richard Manſet for Term of his Life, and then to remain to Robert Green and the Heirs Males of his Body, and for Default of ſuch Iſſue to Thomas, and he to pay 40 Pounds to the Children of Robert. The only Queſtion was, whether Thomas, under whom the Defendant claims, took a Fee-ſimple in the Lands of Clay, or but for Term of his Life; For William purchaſed no other Lands for him, and both William and Thomas are dead, and it was adjudged without difficulty that he took a Fee-ſimple after the Death of William; for though the firſt Words taken by themſelves would have given him but an Eſtate for Life, yet the Word [Purchaſe] in the ſecond Clauſe imports in common Speech an abſolute purchaſe in Fee, though a Purchaſe may be alſo for Life; as Fee imports Fee-ſimple, and the Feaſt of S. Michael the moſt Notorious and eminent Feaſt; except it be otherwiſe ſpecified. And therefore if a Man appoint his Executors to purchaſe 100 Pounds Land for a younger Son, no doubt it will import a Fee-ſimple: Alſo he ſays that if William Purchaſe, then he ſhall ſell the Land in Clay as his own, that is, he ſhall have Power to ſell them then, and not before: Whereas if Thomas took an Eſtate but for Life, he might have ſold them before as his own.

2 Cro. 416. Roll. 1 Abr. 834. Co. L. 189. a.

Again, he was appointed to purchaſe other Houſe and Land of as good Value (not yearly Value) as the Houſe and Land in Clay. Now the Value of the Land is according to the Value of the whole Eſtate. And ſo it is apparent that the Meaning was, that he ſhould have the one Land of as good Value and Eſtate as the other: And that appeared alſo in that he was to pay the 10 Pounds howſoever; and it was urged, that the Payment of 10 Pounds did alſo inforce a Fee-ſimple, which were clear, if the Will be underſtood, that he ſhould pay his 20 Shillings a Year, from the Death of the Teſtator before his Eſtate fell in Poſſeſſion. But becauſe I rather take the Meaning otherwiſe, the paying of 20 Shillings yearly could be no Peril unto him, becauſe if his Eſtate ſhould ceaſe, he would ceaſe his Payment; otherwiſe it had been to pay his 10 Pounds at once, but yet it would have made the Legacies of 20 Shillings a Year unto the Daughters uncertain, which the Teſtators made certain, for otherwiſe he would have ſaid, that he ſhould have paid it by 20 Shillings a Year, if the Eſtate came to him, and they live ſo long. And for the other Clauſe it was holden clearly, although it ſpake of the Lands in Stukey, or elſewhere, that [elſewhere] can never extend to the Lands in Clay upon all the Parts of the Will, as before, though he have no Lands but in Clay and Stukey. But the Word [elſewhere] ſhall be rather Surpluſage and void, than by ſuch a looſe Word to alter a large, plain and particular Deviſe before.

6 Co. 16. a. Co. L. 9. b. 1 Cr. 158. 2 Cr. 416, 527, 591, 599. 3 Co. 21. 3 Cr. 205, 378.

Ro. 2 Ab. 253. 3 Lev. 438. 2 Vent. 351. Deviſe expreſs ſhall not be altered by doubtful Words. 2 Cr. 599.

(69) Cocke *verſus* Jennor. Treſpaſs.

Lit. Sect. 376. Ro. 2. Ab. 412. 10 H. 6. 41. b. Releaſe to one Treſpaſſer diſchargeth all. 3 Cro. 31. 3 Leo. 122. Co. L. 232.

If there be two Diſſeiſors of Lands, and the Diſſeiſee releaſes all his Right to one of them, it being a joint Diſſeiſin and Treſpaſs, the Releaſe ſhall hold his Companion out. 10 Co. 119. a. 3 Leo. 53. Ante 59. 1 Cr. 243. N. B. 107. e. 1 Cr. 55. 2 Cr. 349, 385. 27 E. 3, 83. 10 Co. 7. a. 5. b. 1 Cr. 58, 192. poſt 70. 11 Rep. S. J. Heydon 180, 164. 2 Cro. 118. 3 Leo. 122. 10 Co. 119. a. 3 Cro. 860. Cr. Jac. 351, 349. 39 E. 3. 17. Yelv. 68. accord.

THomas Cocke brought an Action of Treſpaſs againſt Kenelme Jennor for Breaking his Houſe at Dunmow, and Beating him the laſt Day of October, in the tenth Year of the King. The Defendant pleads, that he together with one Robert Milborne in the Time of the Treſpaſs ſuppoſed, did jointly break the Plaintiffs Houſe, and beat him, and that afterwards on the thirteenth Day of June 11 Jac. R. the Plaintiff did releaſe unto the ſaid Milborne by his Writing, which the Defendant ſhews in Court, all Actions Real and Perſonal, &c. and avers, that the Treſpaſs, whereof the Plaintiff complains, and which he and Milborne did jointly, eſt una & eadem, & non alia neque diverſa. Whereupon the Plaintiff demurred, and it was adjudged for the Defendant; for though a Treſpaſs be joint, and ſeveral to this Purpoſe, that he may ſue either one or all, yet when two join in a Treſpaſs, they ſo make one Treſpaſſer, as either of them is as well anſwerable for his Fellows Fact as for himſelf. And therefore a Releaſe to one diſchargeth the whole Treſpaſs; and alſo a Releaſe is as good a Satisfaction in Law, as a Satisfaction in Deed; and therefore if an Executor releaſe, the Debt releaſed is judged Aſſets in his Hand: Now againſt joint Treſpaſſers, there can be but one Satisfaction, and therefore if they be ſued in one Action, though they may ſever in Pleas and Iſſues, yet one Jury ſhall aſſeſs Damages for all; and as to the Damages, he that is no Party to the Iſſue, ſhall have an Attaint as well as his Fellows; and if they be ſued in ſeveral Actions, though the Plaintiff make Choice of the beſt Damage, yet, when he hath taken one Satisfaction, he can take no more, and if he require two, an Audita Querela will lie.

(70) Ledſham *againſt* Rowe *and* Mudge.

Co. B. Treſpaſs. *Venire fac.* awarded *ad triandum exitum*; where there are divers others. 2 Ro. 667. poſt 64.

THomas Ledſham brought an Action of Treſpaſs againſt John Rowe and Chriſtopher Mudge, for Impriſoning of him five Days, John pleaded not guilty to four Days, whereupon Iſſue, and to the other Day Juſtification, and thereupon another Iſſue: And then Chriſtopher did divide his Pleas in like Manner, into two, whereof the latter was a Juſtification, and thereupon Iſſue taken, and then follows the Award of the Ven. fac. in theſe Words, Ideo quoad triandum tam exitum iſtum quam prædictum alium exitum inter prædict. Thomam & præfatum Johan. Rowe ſuperius mentionat. præceptum eſt Vic. &c. And it was excepted, that this Award was inſufficient, as being uncertain, and could not be applied to all, though the Jury had given Verdict for all, but it was ruled good, becauſe exitus may reſpectively ſerve for all reddendo ſingula ſingulis.

(71) Pariſh *of* Aſton *verſus* Caſtle-birmidge Chapel.

Conſultation. Warwick. Church and Chapel the Precincts and Separations. Ro. 2 290. 1 Cr. 92, 394. March 91. 2 Ro. R. 265. 5 Co. 66. b. Palm. 552. Ro. 12. b. Bulſt. 1, 16, 17. Degg. 76. Jones 355.

THe Caſe was in the County of Warwicke, that there was a Pariſh called Aſton, and a Pariſh Church there; there was alſo in the ſame Pariſh a Chapel called Caſtle-Birmidge Chapel, and a certain Precinct called Caſtle-Birmidge: The Inhabitants whereof did reſort to the Chapel, and there married, chriſtned, and received Sacrament and Sacramentals, and had Church-wardens there, and a Perambulation there of it ſelf, but they buried not there, but at Aſton for the Parſonage was appropriate, and the Vicar found them a Curate at his Charge, to ſerve them at the Chapel. Now the Church of Aſton being in Decay, the Pariſhioners of Caſtle-Birmidge were taxed towards the Reparation thereof, with the reſt of the Pariſh of Aſton, and obtained a Prohibition upon Surmiſe, that there was a Chapel Parochial: and that they alone had uſed Time out of Mind to repair that at their own Charge, and by Reaſon thereof, had been diſcharged of the Reparation of Aſton Church, yet in their Prohibition they confeſſed they were within the Pariſh of Aſton, and that they buried

there. Now Motion was made for a Conſultation, and Day given to both Parties, and being heard it appeared to be as before, ſaving that there were ſhewed on the Behalf of Aſton two Sentences in the Eccleſiaſtical Court, one in the 16 of Eliz. whereby the Pariſhioners of the Chapel were ſentenced to pay towards the Reparation of the Church, and another in the 30 of Queen Elizabeth, whereby they were ſentenced to bear the Office of Church-wardens, at the Church of Aſton. And now where there were five Sentences on the contrary on the Behalf of the Pariſhoners of the Chapel they were all by appeal diſannulled; whereupon the Court awarded a Conſultation; for though the Surmiſe were Matter of Fact, and triable by the Jury, yet it is in Diſcretion of the Court to deny a Prohibition, when it appears unto them that the Surmiſe is not true, and eſpecially in a Caſe of this Nature, when the Delay of Reparation may turn to a final Decay of the Church, and the intolerable Charge of the Pariſhioners both in Repairing and in Suit, for the Suit in this Caſe had coſt already (as was ſaid) three hundred Pounds. Now it was apparent to the Court, that they were to all Purpoſes Part of the Pariſh of Aſton, and therefore de communi Jure, were liable to Reparation with the reſt; For though they had this Chapel for their Eaſe yet they might reſort if they would, to the Mother Church, and the Reſervation of Burial was a Saving of the old Right and no doubt but the Vicar might ſerve them in Perſon at their Chapel, as well as his Curate. Therefore, ſince the Proof lay on their Side of their Diſcharge, and ſo much ſhewed to the contrary on the other Side, and nothing of theirs, ſave only an Acquittance in the 11 Year of the Queen, that forty Shillings was received of them as of Benevolence, and not of Duty, made by two Men Collectors for the Reparations; which moved the Court nothing, becauſe the Folly of two Men could not change the Right nor bind the Pariſh: And the ſame Acquittance appeared to have been pleaded and over-ruled in the Sentence, in the 16 Year of the Queen: Therefore the Conſultation was awarded, as before, yet it was holden, that if two Churches parochial be united, the Reparation ſhall be ſeveral, as before. And in the Principal Caſe, if the Men of Caſtle Birmidge had been Time out of Mind diſcharged of the Repair of the Church of Aſton, the Prohibition might have lain.

It is in the Diſcretion of the Court to deny a Prohibition. 1 Sid. 65. ultra.

2 Cro. 395, 93, 394. 2 Inſt. 363.

Noy 41.

(72) Cuddington *verſus* Wilkins.

Caſe. 1 Roll. 88. Ab. f. Brownl. 10. Lutw. 81. Palm. 344. Calling a Man Thief after a general or ſpecial. Trin. 33. Jac. Rot. 933. poſt 81. Owen f. 150. S. C. Moor 863, 872. Swinb. 295.

CUddington brought an Action of the Caſe againſt Wilkins, for calling him Thief; The Defendant juſtified, becauſe beforetime he had ſtoln ſomewhat: The Plaintiff replied, that ſince the ſuppoſed Felony the general Pardon in the ſeventh Year of the King was made, and makes the uſual Averment to bring himſelf within the Pardon. Whereupon the Defendant demurs: ſee Staundford plac. Coronæ 180. That if a Man arreſted for Felony break Priſon, he ſhall loſe his Battail; but yet if the King Pardon him that, it is reſtored. F. Coronæ 281. 1 and 2 E. 3. F. Coronæ 154. So here the Felony is by the Pardon extinct.

And in the End this Caſe was adjudged for the Plaintiff, though it may be, he knew him not to be within the Pardon; for there is no Cauſe to favour idle and injurious Words: But perhaps if he had arreſted him for the Felony after Pardon, it might have been excuſed if he knew it not, becauſe it is an Act of Juſtice, vide reſiduum infra fol. 81.

Poſt. 292. Kelw. 26. 1 Sid. 52. accord. 2 Cr. 626.

(73) Worthington *verſus* Garſtone.

Kings Bench. Roll. 1 ab. f. 17. meſme Caſe Vaugh 91.

MIch. 22 and 23 Eliz. B. R. Rot. 378. William Worthington brought an Action of the Caſe in the Kings Bench againſt John Garſtone, and declared, that where he, at the Requeſt of the Defendant, did ſollicite and proſecute an Action of Treſpaſs between the ſaid Garſtone Plaintiff, and, and John Saunders Defendant: the ſaid Garſtone did promiſe to pay to the ſaid Worrhington one

Dyer 356. b. Solicitor brings an Action for a Sum promiſed for ſolliciting. Jones 208. Hetly 129. Winch. 53. 1 Cro. 160, 107, 193, 769. 3 Cr. 760.

hundred Pounds; the Defendant pleaded, that he made no ſuch Promiſe, and it was found for the Plaintiff, and aſſeſſed Damages to ſeventy Pounds, and now it was alledged in Arreſt of Judgment, that the Solliciting and Proſecuting of another Man's Suit, is not lawful for any, but for an Attorney, or Counſellor at Law. But the Court did agree without Argument (Wray being abſent) that it is lawful to be a Solicitor, if it be not for Maintenance, or that he lay not Money out for Maintenance.

Co. B. Aſſumpſit. (74) John Richards *verſus* Matth. Carvamel.

Brownl. 1 R. 10. 1 Ro. 46, 462. Brownlow. Notice when neceſſary. Ante 51. 1 Cro. 571. Yelv. 76, 175, 168. 8 Co. 92. b. Cr. Car. 34, 122. Cr. Jac. 228, 287, 493.

HIll. 12. Jac. Rot 790. John Richards brought an Aſſumpſit againſt Matth. Carvamel an Attorney of the Common Pleas. And declared, that whereas he had informed in the Exchequer againſt one Milton, for ingroſſing of Corn; and was ready for Trial, that the Defendant in Conſideration, that the Plaintiff ſhould not proceed to his Trial, but ſhould deſiſt from his proceeding, and ſhould alſo deliver him a Note of his Coſts and Charges, expended in the Suit, did promiſe to pay him ſuch Charges expended in the Suit at the Plaintiff's firſt comming into Somerſetſhire, and then laid the Performance of the Conſideration on his Part, and that ſuch a Day after, and before his Action he came firſt into Somerſetſhire, that is to ſay to Taunton, and yet the Defendant paid him not his Charges, being ſix Pounds odd Money, which he had diſburſed, and made known to him, by his Note delivered (as aforeſaid:) And upon Non aſſumpſit, it was found for the Plaintiff: And it was ſaid in Arreſt of Judgment, that the Plaintiff ought to have given Notice unto the Defendant of his firſt coming into Somerſetſhire, becauſe it was a Thing lying beſt in his own Notice, and that alſo becauſe the Defendant undertook not the Payment by Bond, but by Aſſumpſit only. And to this Opinion Warberton agreed.

1 Roll. 462. ultra.

Yelv. 168. 2 Cr. 493. Hutt. 80.

(75) Priddy *verſus* Maſſie.

Ven. fac. form amended. 1 Roll, 204. 2 Cro. 595.

AN Ejectione firmæ was brought by Priddy againſt Maſſie. In Arreſt of Judgment after a Verdict, it was ſhewed, that in the ven. fac. the Concluſion was Et habeas ibi hoc bre. omitting nomina juratorum, &c. Alſo that where but one was put in by tales, the Title of Addition was, nomina juratorum, &c. And yet Judgment was given for the Plaintiff, for the ven. fac. is warranted, and muſt be amended by the Roll, and the other Exception is, nothing. 1 Cro. 46, 162, 442, 458.

Amendment cannot be of the Roll. 5 Co. 32. a. Debt. 1 Cro. 38.

Debt. (76) Leiceſter *againſt Sir* William Read.

Yelv. 179. 2 Cr. 246. 5 Co. 32. a. *Teſtatum* requiſite upon the Roll.

LEiceſter brought an Action of 500 Pounds Debt againſt Sir William Read as Executor, in London, de bonis teſtatoris, and 5 Pounds Damages, de bonis propriis, ſi non, &c. upon Fieri fac. into London, the Sheriffs return that he had waſted the Goods, and that he had no Goods of his own. Whereupon Leiceſter took a Fieri fac. againſt him into Durham de bonis propriis, and the Writ was quod teſtatum eſt, that he had Goods there, but indeed there was no teſtatum upon the Roll, nor Warrant for the Writ. Whereupon a ſuperſedeas was awarded, and an Execution upon that Writ made by a Sale of a Leaſe diſcharged. And it was a Caſe of great Extremity proſecuted by Leiceſter againſt Conſcience.

Yelv. 6 Cr. El. 597, 598. Mo. 542.

(77) *Sir* Richard Lovelace *and his Wife againſt* Arthur Cocket.

Brownlow. Brownl. 1 R. 47. Cr. Jac. 579. 1 Cr. 51, 93, 89. New Bond given diſchargeth not another. 1 Cr. 85. Co. L. 212. b. 6 Co. 45. b. 44. a. Plo. 5. b. Hurr. 76. Cr. Car. 8. 85. poſt 69. 1 Cr. 193. 4 H. 6 17. a. 18. a. 4 Co. 60. a. 5 Co. 28. b. Dyer 21 b. 20 H. 6 45. b. Styl. 339. Dy. 1. a. 6 Co. 44. b. Mo. 872.

MIch. 6. Jac. Rot. 1001. Sir Richard Lovelace and his Wife, brought an Action of Debt upon an Obligation of 100 Pounds, made to her when ſhe was ſole, for the Payment of 52 Pounds 10 Shillings, by Arthur Cocket the Defendant, who pleaded that at the Day of Payment of the 52 Pounds 10 Shillings, he and ſuch an one as his Son did make a new Bond

Bond of another 100 Pounds, to the ſaid Wife being then alſo ſole, for the Payment of the ſame 52 Pounds 10 Shillings at another Day then to come, in full Satisfaction of the ſaid 52 Pounds 10 Shillings, and that ſhe ſo accepted it, whereupon it was demurred and judged for the Plaintiff, for it was holden no Satisfaction actual and preſent, as it ought to be.

Mod. R. 221. 3 Cr. 193, 716. Plo. 5. b. 9 Co. 79. b.

(78) Rawden *verſus* Strut.

TR. 13 Jac. Rot. 1011. Rawden brought an Action of Debt againſt one Strut, upon an Obligation for Payment of a leſs Sum. And the Defendant pleaded a new Bond given at the Day in full Satisfaction, and ſo accepted, as in the former Caſe, but the Plaintiff did not Demurr upon the Plea, but took Iſſue that it was not accepted, &c. And by Verdict it was found againſt the Plaintiff. And yet Hutton for the Plaintiff prayed Judgment, becauſe the Bond, whereupon the Action was brought, and the Action it ſelf was denied, but as good as confeſſed, and the Plea to diſcharge it was none in Law. And reſembled it to the Caſe of 9 H. 6. fol. 37. But it was ſaid on the other Side, that by the Statute of 32 H. 8. of Jeoffails, Judgment ought to be given for the Defendant, according to the Verdict. Note, that the Caſe was miſtaken by Hutton, for the Plaintiff was Nonſuit before Verdict.

1 Brownl. 74. Verdict that new Bond was given for another, whether this amount to a Confeſſion of the Action. Ante 68. Apr. 326. 5 Co. 43. Mo. 867. Winch. 76.

Ant. 56. Poſt 113.

(79) Boothly *verſus* Baily.

BOothly, an Executor of Gilbert, brought a Prohibition againſt Baily, and his Surmiſe was, that whereas Sir Bernard Whetſton was ſeiſed of the Manor of Woodford Hall, and that he and thoſe, whoſe Eſtate he hath in the ſame, had uſed Time out of Mind to have a peculiar Pew in the Body of the Church, and that the Defendant by Suit in the Eccleſiaſtical Court, ſought to diſpoſſeſs them of the ſame.

Br. Chattels 11 Co. L. 121. b. 2 Cro. 366. Moor 878. 8 H. 7. 12. 12 Co. 105, 106. Noy 78, 104. Godb. 200. Sid. 88, 203. Pew in the Body of the Church.

And by the Opinion of the whole Court, this was no ſufficient Ground of Prohibition: For though the Church and Church-yard be in Law the Soyl and Freehold of the Parſon, yet the Uſe of the Body of the Church, and the Repair and Maintenance of it is common to all the Pariſhioners. And for avoiding of Confuſion, the Diſtribution and Diſpoſing of Seats and Charges of Repair belong to the Ordinary, and therefore no Man can challenge a peculiar Seat without a ſpecial Reaſon. But if it had been preſcribed, that Sir Bernard Whetſton, &c. had uſed Time out of Mind at their only Coſts to maintain that Pew, and had therefore had the ſole Uſe of it, the Preſcription might have ſtood, and had been Warrant for a Prohibition, though the Pew were in the Body of the Church. And ſo it is in the like Caſe of an Iſle or Chapel adjoining to the Body of the Church upon the ſame Difference, whether it have been maintained by the whole Pariſh, or by ſome particular Perſons, like unto the Reaſons of a Chapel of Eaſe.

Co. L. 18. b. 121. b. Pop. 140.

The Court ſhall judge by Diſcre ion the Convenience of Things uncertain. 1 Sid. 88. Degg. 180. Bridg. 4 Pop. 140. Cr. Jac. 360, 605 Noy. 76. Godb. 199. 2 Ro. 288.

(80) Auſtin *verſus* Jervoyſe.

TRin 13 Jac. Rot. 2180. John Auſtin being within Age brought an Aſſumpſit by Prochein Amy, againſt Jervoyſe, and declares, whereas he bought of the Defendant a Horſe for a Piece of Gold of 22 Shillings paid in hand, and for 11 Pounds more to be paid at the Death or Marriage of the ſaid John, for which he ſhould become bound with ſufficient Surety by their Writing obligatory. The Defendant in Conſideration thereof, promiſed to deliver him the Horſe when he ſhould be required, and ſays, that afterwards he offered to become bound to him, but ſays not by his Writing obligatory, with a ſufficient Surety for the Payment of the ſaid 11 Pounds (as aforeſaid) but yet he hath not delivered him the Horſe, though he were required.

1 Brownl. 11. Poſt 77. 1 Roll. 19, 465. Aſſumpſit. Aſſumpſit to give Bonds for 11 Pounds not ſaying what Sum. *Reſiduum infra.* 2 Saund. 120. 4 Co. 53. b. Pop. 130. Hutt. 92. Co. L. 135. b. Poſt. 77. 197. Yel. 49, 58. 4 Co. 125. a. 9. Co. 30 b. 76. b. 8 Co. 45. a. 58. b. 10 Co. 43. a, 1 Cr. 224. 8 Co. 61 b. Mod. R. 70.

The

2 Cro. 116.
Severance Fitz. 23.

The Iſſue Non Aſſumpſit, and the Verdict for the Plaintiff. But he could not have Judgment, for he ſhould have tendred the Obligation ſealed, he ſhould ſet down the Sum, that the Court might judge if it were Sufficient for the 11 Pounds, the Surety ſhould have been named.

(81) Parker *verſus Sir* John Lawrence, *and* Nevil *and* Wood.

Cheq. Cham. Treſpaſs.
H. 11 Jac. B. R. Rot. 1355.
2 Ro. 100, 101, 233.
Jenk Cent. 309.
1 Sid. 76.
Mo. 624. Cr. Car. 239, 243. Poſt 180. 2 Lev. 177.
London.
V. Cooke 2 part. 279, &c. 11 Co. 7. a. 1 Cro. 243. 551. 1 Cro. 234. ultra. 2 Roll. 100, 101, 134.
Diſcontinuance judgment againſt one in Treſpaſs, and Nonſuit againſt the other.
3 Cro. 860. 2 Cr. 38. 1 Cro. 55, 551. Noy 116. Ben. 99 poſt, 180. Cr. Jac. 443. 138.

JOhn Parker brought an Action of Treſpaſs againſt Sir John Lawrence, and one Nevil and Wood. Lawrence pleaded not Guilty, whereupon Iſſue: Nevil and Wood made a Juſtification; whereunto the Plaintiff replied, and thereupon a Demurrer joined: Hanging the Demurrer, the Iſſue was tried againſt Lawrence, and Damages given, and Judgment againſt him. And after Judgment the Plaintiff entred a Nolle proſequi againſt Nevil and Wood, whereupon this being in the King's Bench, they all brought a Writ of Error againſt Parker, in the Exchequer Chamber, and alledged for Error, that the Nolle proſequi diſcharged all the Defendants; and it was agreed by the Court, that if the Nolle proſequi had been before Judgment, it had diſcharged the whole Action, and ſo had it, if Judgment had been againſt them all, and then the Plaintiff had entred the Nolle proſequi againſt the two, as before, for Nonſuit or Releaſe, or other Diſcharge of one diſcharges the reſt. But becauſe in the principal Caſe the Action was at an End againſt Lawrence, and no Judgment had againſt the other two, ſo as they are divided from Lawrence, and are not ſubject to the Damage found againſt him, it was adjudged that he was not diſcharged, and ſo no Error.

Note alſo that it ſeems that Nevil and Wood ſhould not have joined in this Writ of Error. For there was no Judgment againſt them, nor they grieved.

Note, the Writ of Error is ad grave damnum, &c.

Error.

(82) Lady Plat *verſus* Plummer.

2 Cro. 384, 541.
Jenk. Cent. 295.
1 Roll. 333.
Bail entered laſt Day of the Term.
T. 12. Jac. R. B. Rot. 558.

IN the Exchequer Chamber in a Writ of Error by the Lady Plat againſt one Plummer, it was ruled by the Practice of the King's Bench, that though the Defendants Bail be taken and entred but the laſt Day of the Term, and the Bill be put in before any Time that Term, it is good enough, yet from the Time of the Bail the Defendant is Anſwerable as in cuſtodia Mareſcalli, and not before in Strictneſs of Law.

(83) Lambe *verſus* Wiſeman. Error.

Jenk. Cent. 295.
Ven. fac. returned by two of 4 Coroners, H. 11. Jac. Rot. 1036.
2 Cro. 383. 2 Roll. 673.

LAmbe brought a Writ of Error againſt Wiſeman upon a Judgment given againſt him in the King's Bench upon an Obligation, Iſſue taken upon Payment, upon a good Surmiſe the Venire fac. was awarded to the Coroners, and Verdict found and Judgment for the Plaintiff. The Error aſſigned was, that where the Ven. fac. was returned by two Coroners only, and the Diſtringas by three Coroners; there were at the Time of the Award and Return of the Ven. fac. and Diſtringas 4. and it was agreed that this was at the Common Law plain Error, for Coroners as Miniſters muſt all join, but as Judges they may divide. But by the Statute of Jeoffails it was made good by the Words of imperfect and inſufficient returning of Proceſs by Sheriffs or other Officers: Yet the Court was of Opinion, that if one Sheriff of London make his Return without his Fellow, that this would not be holpen, as being no Return at all; or a Return without the Sheriff's Name ſubſcribed, becauſe the Court knows that one Sheriff there is two Perſons, but it appears not to the Court, that there are more Coroners.

Co. L. 181. b.
Verdict remedileſs.

Ben. 39. 11 Co. 4. b.

Sir

(84) *Sir* John Sherly *Knight, and* Dorothy *his Wife, late Wife of Sir* Henry Bowyer, *againſt* Barbary Wood *Widow.* Co. B.

SIr John Sherly Knight, and Dorothy his Wife, late Wife of Sir Henry Bowyer, brought a Writ of Dower againſt Barbary Wood Widow, of Lands in Hartfield, ex dotatione Bowyer quondam viri ſui, the Tenant pleaded, that the ſame Bowyer being ſeiſed of the Manor of Wilborough in the ſame County, did make a Feoffment thereof, to the Uſe of himſelf and the ſaid Dorothy then his Wife, for Term of their Lives, for the Jointure of the ſaid Wife, the Remainder to one Bowyer, and then died: And that the ſaid Dorothy held her in by Survivor, claiming her ſaid Eſtate, and ſo demanded Judgement: The Demandant replied, that before the ſaid Feoffment made the ſaid Sir Henry Bowyer being ſeiſed of the ſaid Mannor did covenant to ſtand ſeiſed thereof, (by the Name of his Land in Suſſex, except ſuch as he had deviſed, or ſhould deviſe by his laſt Will and Teſtament: And in the End of his Plea avers that he made no Deviſe thereof) to the Uſe of himſelf in Tail, the Remainder to his ſaid Wife for Term of Life, the Remainder to Sir Thomas Hendly in Tail, and afterward made the Feoffment prout, and then died without Iſſue. And that ſhe entred and was ſeiſed by Force of a Remitter, whereunto the Tenant rejoins that ſhe held her claiming her Eſtate by the Feoffment in Jointure, and demands Judgment, whether againſt that Claim ſhe could be remitted; upon which Plea the Demandants demurred. And Nichols, Winch, and my ſelf held the Tenants Plea inſufficient, but Warberton was of the contrary Opinion.

2 Cro. 488. Moor. 872. 2 Roll. Rep. 33. m. 2 Rolls 422, 423. Mo. 870, 872. poſt 104. Dower. Suſſex. H. 10 Jac. Rot. 810. and Tr. 10. Jac. Rot. 3803.

Mo. 872.

And firſt was held, that the Remitter to the Woman could not work till her Husband was dead without Iſſue, becauſe till then the Poſſeſſion and Right did not meet together in her. Alſo we held, that becauſe both the Eſtates were made unto her during Coverture, that therefore regularly upon the Death of her Husband ſhe might claim which Eſtate ſhe would, according to the Books of Mich. 2. and 3 Eliz. Dyer 191. and 18 Eliz. Dyer 351. But I ſpeaking laſt added this Diſtinction, that though this were true, where the Election did concern no Body but her ſelf (and ſo are thoſe two Caſes there without Prejudice to a third Perſon) yet here Hendly was in Remainder by the firſt Conveyance, and not ſo by the ſecond; and therefore it ſhould be a Prejudice to him in his Remainder (which roſe together with the firſt Eſtate, and that they two together make but (as it were) one Eſtate to ſome Purpoſes: for perhaps upon a Grant of Reverſion it might be otherwiſe) if the Law ſhould not judge her in her Remitter at the firſt, volens nolens. And ſo is the Judgment expreſly 41 E. 3. 17. in John Sayes, Caſe and never Judgment to the contrary ſince: And ſo I hold with Littleton if a Tenant in Tail infeoff his Son within Age, and die, the Iſſue in Tail ſhall be remitted, being a Kind of third Perſon by the Intent of the Statute of Weſtm. the 2. though temps E. 1. Fitz. Remitter 13. the Reporter be of a contrary Opinion. Now according to my Opinion, a Plea of Claim by Force of the Jointure is utterly avoided by the Neceſſity of the Remitter wrought by Act in Law. But if the Election be allowed free, yet the Claim by Force of the Jointure was pleaded out of Time, and ſo is idle, and requires no Traverſe, whereof the Reaſon is plain, for the Statute of Uſes hath a general Purview, That Jointures made for Wives, without diſtinguiſhing before, or after Coverture, ſhall bar Dower, and then comes with a Proviſo, that, if it be made during Coverture, ſhe may refuſe it and take her Dower, which is a Kind of Remedy provided for her out of the Generality of the Law, and therefore muſt be pleaded by her. And in this Caſe there appeared nothing to the Court until the Tenant firſt pleaded of any other Eſtate, that the Demandant had, but only the Title of Dower, and therefore it was in vain to plead that ſhe claimed by her Jointure, becauſe there appeared no other Eſtate to claim by, like unto the Point in the latter End of Walſingham's Caſe, where the Averment, that Sir Thomas Wyat had Iſſue alive, was holden void. And ſo there, if a Man bring an Action upon an Obligation by J. S. and aver that he was

Poſt 255. Sid. 65. Co. L. 357. a.

Poſt, 255. accord.

Remitter *volens nolens* for Benefit of a third Perſon.

2 Cr. 490.

Pleas out of a Time are idle, and not traverſable.

was then of full Age, or plead a Feoffment abſolute and without Condition, theſe Averments are out of their Place, and therefore void, and ſo the other Party ſhall plead Nonage or Condition, and ſhall not traverſe, but be traverſed. And this was the main Point, wherefore Judgment was given for the Demandant, becauſe the Remitter and the Claim by Force of that amounted to a Refuſal of the Jointure, and therefore that ſhould have been traverſed.

1 Cr. 490.

Exception that croſſeth the Grant.

Laſtly, the Exception I held to be void, for there could be no Lands at that Time deviſed, becauſe Bowyer was alive, and the Exception of ſuch Lands, as he ſhould after deviſe was repugnant, becauſe the Covenant was to take Effect from the making of the Indenture. As if a Man ſhould bargain and ſell all his Land (except ſuch as he ſhould after Deviſe.) And beſides, ſuch an Exception undoeth the whole Grant, or pretended to put it in his Power to revoke all, and therefore is void, as 18 Eliz. lib. A. If J. S. make a Leaſe of all his Land in Dale, except the Manor of Dale, and he hath no Lands there but the Manor, the Exception is void, and all will paſs. But here this Point of the Caſe was cleared, becauſe it was averred that this Manor was not deviſed. So Judgment was given for the Demandants, Warberton being to the Contrary, and a Writ of Error was brought in the Kings Bench.

Poſt, 170.

(85) Foreſt *verſus Sir* James Sandland *Knight.*

Jenk.Cent.293. 1 Rolls. 754, 755. 1 Ro. R. 29. 1 Rolls Rep. 294. m. 1 Cro. 286, 300, 464. 2 Cro. 171. Yelv. 157. Jones 325. 1 Cro. 408, 300, 574. Godb. 440. Cr. Car. 286, 408, 464. 574. Cr. Jac. 171. Jones 325. 1 Cro. 620. 4. 142, 300. 3 Cr. 730. Checq. chamb. Error. 2 Cro. 384. m. One writ lieth not upon the ſeveral Judgments againſt Principal and Bail.

Error out of the King's Bench, *Quod coram vobis reſidet.*

FRancis Foreſt a Frenchman brought an Aſſumpſit againſt Sir James Sandland, and one Doctor Tenant was his Bail, and Judgment was given in the Kings Bench againſt the Principal, and after by Scire fac. againſt the Bail, and now the Principal and Bail joyned in one Writ of Error in the Exchequer, and it was abated by Judgment, becauſe they could not joyn; and it was deſired, that the Bail might have a new Writ of Error by himſelf, Quod coram vobis reſidet, but it was denied him, both becauſe the Scire fac. is none of the Action, wherein the Writ of Error is given in the Exchequer Chamber; and alſo becauſe the Record doth not abide before theſe Judges, but in the Kings Bench; yet it was otherwiſe ruled heretofore, in the Caſe of one Matthewes, but it paſſed ſub ſilentio.

(86) Humberton *verſus* Howgil.

Jenk. Cent. 295. Cheq. Chamber. Norfolk T. 12 Jac. Rot. 2174. and H. 11. Jac. Rot. 801. Covenous Conveyance is no Conveyance. Poſt, 166.

" HUmberton recovered a Debt againſt Thomas Howgil by Judgment,
" who dyed, and upon a Scire fac. againſt the Terretenants, the Sheriff
" returned John Howgil Tenant of an Houſe that was his, at the Time of
" Judgment in Yarmouth: John Howgil came in and pleaded that Thomas in-
" feoffed him long before the Judgment in Fee abſque hoc, that he was ſei-
" ſed at the Time of the Judgment or any Time after; Whereupon Iſſue
" was taken, and the Jury found the Feoffment, but further ſaid, that it
" was made by Covin, to defraud the Plaintiff and other Creditors. And

Judgment.

it was judged for the Plaintiff, for Thomas remained ſtill ſeiſed, as to the Creditors, notwithſtanding the Feoffment. But if the Iſſue had been taken directly infeoffed, or not infeoffed, it had been found againſt the Plaintiff, for in that Caſe he muſt avoid the Feoffment by Covin eſpecially pleaded, for it is a Feoffment tiel quel. As you cannot plead non eſt factum generally upon the Statute of Uſury, or the Statute of Sheriffs: But here the Iſſue is general ſeiſed, or not ſeiſed by the Feoffment like Gooches Caſe, Co. lib. 5. fo. 60. And therefore the Covin may be given in Evidence, when the Feoffment is given in Evidence.

8 Co. 119. b. Plo. 66. b. 3 Co. 59. b. Poſt, 166. 5 Co. 119. a. accord. Jenk. Cent. 295. 1 Leo. 226. Det. 80. 3 Cro. 233.

(87) Pope *verſus* Skinner. Replevin.

1 Brnl. 177. Winch. Ent. 1051. Jenk. Cent. 296. Mo. 863. 2 Ro. 707, 708. Chequer Chamber. Lincoln. Tr. 12 Jac. Rot. 2017. Brownlow Leaſe miſrecited, and yet well. Latch. 93.

POpe brings a Replevin againſt Skinner, who avows the Taking as a Commoner, becauſe the Plaintiffs Beaſts were in the common Damage feſant in April 11 Jac. The Plaintiff in Bar ſays, that one Williams was

ſeiſed upon a Houſe and Land, &c. Whereunto he had Common, &c. and demiſed the ſame unto him, the 30th Day of March, in the ſame 11 Year, to hold from the Feaſt of the Annunciation next before for a Year. The Avowant traverſeth the Leaſe modo & forma, whereupon Iſſue was taken, and the Jury ſaid, that Williams made a Leaſe to the Plaintiff, on the 25th Day of March for one Year, from thence next enſuing: And though this be not the ſame Leaſe, that the Plaintiff pleaded (for this begins on the Day, and the other begins not ſo ſoon) nor was to take his Limitation, but from the Day excluded, yet the Court gave Judgment for the Plaintiff; for the Subſtance of Iſſue is whether the Plaintiff have ſuch a Leaſe or no from Williams, as by Force thereof he might Common at the Time, which appeared for him in this Caſe, and the Modo and forma in the reſt is not material; yet it muſt not depart altogether from the Form of this Iſſue, for if it had been found that he had Right of Common, by a Leaſe from another, or as an Owner, it would not have ſerved his turn, for that had been clear out of the Iſſue, both in Matter and Form. Yet it was granted, that if he had declared in Ejectione firmæ thus, it would have been againſt him clearly, for there he demands and recovers the Term, and therefore muſt take his Title truly. Note that in this Caſe, the Jury might have found direcly againſt the Plaintiff non dimiſit modo & forma, and could not ſafely have found a general Verdict for the plaintiff, ſo that the Judgment of Law upon the Verdict is in Manner againſt the Verdict.

Hutt. 121. Co. L. 46.

Ante 53. 9 Co. 112. a Poſt. 249. 2 Cro. 136. 1 Cro. 272, 282. Jones 314. Yel. 148. Dy. 116. b. 2 Ro. 682. Co. L. 281. Poſt. 209. Ant. 55. Poſt. 82, 89. 2 Ro. 704, 708, 55, 56 1 And. 13.

(88) Curtice's Caſe.

OUt of the Court of Wards, this Caſe; There was an Office found by Writ of Mandamus, before the Eſcheator of Launceſton in Cornwall, after the Death of one Courtice that he died ſeiſed of certain Goods (ſed de quo, vel de quibus, vel per quæ ſervitia ignorant) whereupon a Melius Inquirend' was awarded, reciting the Place and Time of the former Inquiſition, virtute brevis de Mandamus, and that Ignoramus of the Tenure, and ſay not that it was found before the Eſcheator, and then proceeded & quia jam accepimus, that the ſaid Lands or ſome of them were holden of by Knights Service in chief, or otherwiſe by Knights Service, Tibi præcipimus that you ſhall enquire whether the ſaid Lands or any of them be ſo holden. The Chief Baron Tanfield and J (Coke abſent) were of Opinion that the Want of Coram was well enough, both becauſe it was virtute brevis, which muſt be before the Eſcheator; and becauſe there is a Melius Inquirendum in the Regiſter ſo, and a Quæ plura in Fitz. Na. Br. 155. But we held the Writ vicious, becauſe in an Ignoramus the Inquiry of the Tenure ought to be free and at large, and ought not to be reſtrained to the Kings Tenure only, which is both without Precedent, and Prejudicial to the Truth,

Melius Inquirend. upon an *Iguoramus* ought to be at large. Jenk. Cent. 294. Mo. 317.

Ante 38. Accord, 50.

(89) Tredwayes Caſe. Chequer.

EDward Tredway being the King's Ward of Lands, holden of the King by Knights Service in Chief, died the King's Ward; and by Devenerunt after his Death, it was found in the Thirteenth Year of the King, that Lettice and Elizabeth were his Siſters and Heirs, and both of full Age. And that Lettice the Elder, in the Life of her Brother the Ward, departed the Realm without Licence, to prevent her Religious Education, and was and remains a Nun profeſt at Doway, and that the profits of all the Lands, by the Statute of 3 Jacobi cap. 5. belong unto her other Siſter Elizabeth.

This Caſe was reſolved by Montague and my ſelf for the King, and ſo publiſhed and decreed in the Court of Wards; Tr. 15 *Jacobi*, Tanfield Chief Baron continuing in the contrary Opinion. Jenk. Cent. 297. Ley. 59.

The Queſtion was, what ſhall become of the Part of Lettice; and my Lord Chief Juſtice Montague and I agreed clearly, that the Moiety of Lettice, as to the State of the Land was not forfeited nor ſettled in Elizabeth, for the Statute is, that ſhe ſhall take no Benefit by Deſcent, &c. not that ſhe ſhould not take by Deſcent, and then proceeds to ſhew the Meaning thereof, that the ſaid Profits during her Unconformity, ſhall be received by the next of Kin, and they alſo ſhall be anſwerable unto her after

her Conformity, and therefore this Statute differs both from the Statute of 5 R. 2. of consenting to ravishing, and 11 H. 7. of Discontinuances by Women; so that if this were in Common Lands, we doubt not but that Elizabeth might enter into all, and take the Profits by force of the Statute.

3 Co. 61. b. But now here is a third Person, that is, the King, that is interessed in the Profits till Livery sued, and he is not bound to give Livery to the Heir, till the Oath of Supremacy be taken: So as the very Heir cannot enter in this Case upon the King, nor sue Livery: Neither seems it the Meaning of this Law by general Words which are satisfied in other Cases to change the former Law in this Point, either to give the Sister Power or to take that Half without Livery, or to sue Livery in her Sisters Name, without her Sisters performing of the due Ceremonies; and the Profits received by the King, answer the Scope of the Law, that the Recusant hath them not for her Punishment, and not to bestow in ill Uses. And make the Case, that this were a Son and Heir, I hold the next of Kin can neither require Livery out of the King's Hands, nor enter without Livery. And it is confessed, that if the Sister beyond Sea were within Age, and so in Ward to the King, that the other Sister coming to full Age, could not demand Livery of that Part in her Sisters Name during her Minority, and yet the Words will carry it. And by this Construction it shall be better with a Recusant flying the Realm, than abiding here. And it may be made a Practice, that the King's Tenant or a Recusant may send his Heir apparent over, and then the next of Kin shall receive the Profits, who may perhaps imploy them under-hand to the Use of the Heirs in all, or in part, which Bargain may easily be made, considering that it is but Tenant at Will to the Heir that is Abroad, who returning and conforming shall both take the Land, and recover the mean Profits; and so the former Statute, viz. 1 Eliz. c. that requires the Oath of Supremacy before Livery, made as well for their Punishment, as the King's Profit, deluded. And suppose that such an Heir beyond Sea shall bargain and sell his Land to a Stranger, which he may do, since his Estate remains (as aforesaid) I hold that the Bargain in such Cases shall prevent the next of Kin, and also take the Land out of his Hand if he have entred, as in the Common Cases. But yet I hold clearly that the King in such Cases may refuse to give Livery to the Bargain, suing it in the Name of the Heir, except he come and take the Oath of Supremacy in his own Person, according to the Law.

Mo. 177.

(90) Barnes his Case.

Use in Abeyance whether it shall carry the Remainder into Abeyance.

THis was the sole Question in the Court of Wards, whether a Use rising by Covenants, to the right Heirs of a Daughter yet alive should so far transfer the Remainder in Abeyance that it should not be as a Reversion still in the Covenanter: whereof Livery should be sued after his Death, because there is no Person in being (which is the Word of the Statute of Uses) in whom the Land may vest.

Cheq. (91) Knightley's Case.

RIchard Knightley was to sue a general Livery as Heir to his Father Edward, and an especial Livery as Heir to his Mother the Lady Bevil, and sued a special Livery in these Words, Concedimus Richardo Knightley filio & hæredi Dominæ Mar. Bevil, that he without any Livery of his Inheritance, or any Part thereof may enter into all and singular the Manors, &c.

A special Livery how far extended. Quæ fuerunt dictæ Dominæ Mar. Bevil. & de quibus eadem Maria aut aliquis antecessorum præd. R. Knightley, cujus hæres ipse est, fuit qualitercunque seisitus diebus quibus obierunt separatim, vel de quibus aliqua persona seisita fuit ad usum dictæ Mariæ vel aliquorum Antecessorum dicti Richardi Knightley. Tanfield and I held clearly, that upon the Consideration of the Connexion and Coupling of these Words, this special Livery could be extended no farther than to the Inheritance of Dame Mary Bevill.

Roy

(92) Roy *verſus* Biſhop Norwich.

Co. B. Rolls R. f. 235. 6. 2 Co. 385, 383.

IN a Quare Impedit, in the King's Bench, by the King againſt the Biſhop of Norwich, and one Sacre Incumbent: It was reſolved by the Court, that if an Incumbent were guilty of Simony in obtaining a Benefice, that he was made incapable of that Benefice for ever, by the Words of the Statute, 31 Eliz. which are largely to be expounded. And the Caſe of Sir Arthur Ingram was thereupon remembred, who having bought the Office of Cofferer, being an Office handling the King's Treaſure, was holden by Egerton Lord Chancellor, and Coke Chief Juſtice, not only removable for the Preſent, but alſo for ever incapable of that Office by Force of the Statute of 5 E. 6. though he had a Non obſtante, for the Perſon being diſabled by the Statute could not be enabled by the King.

Quare Imped. Diſablement for Simony. 3 Inſt. 153, 154, 234. a. 3 Roll. 336, 349. 1 Inſt. 120. a. *Non obſtante* cannot enable any Perſon diſabled, nor make an Heir whoſe Blood is corrupted. 5 E. 6. 2 Ro. 83. 12 Co. 100. Buls. 3. 92. Pl. 52. Cr. Jac. 534. Godb. 202. Ap. 166.

(93) John Spark *againſt* Tho. Purnell.

Hill. 11 Jac. Ror. 692. Canc. Waller. *Ejectione* Deviſe. Sentences tranſpoſed to ſerve Meaning. Winch. Ent. 407. Mo. 864. Br. deviſe 38.

JOhn Spark brought an Ejectione firmæ againſt Thomas Purnell for Lands in Reyhurſt: Upon not Guilty the Caſe by ſpecial Verdict was found thus: One John Faireman was ſeiſed of the Lands in Queſtion, and of Twenty Acres of Land more in Fee, and had Iſſue three Sons, James, William, and Anthony, and by his Will gave to William his ſecond Son Ten Acres of the Twenty, and to Anthony the other Ten Acres, and then gave to James his Eldeſt Son the Lands in Queſtion, and willed that when James ſhould die without Heirs of his Body, that William ſhould be his Heir, and Anthony ſhould have his Part; and if either the ſaid William or Anthony ſhould die, that then one of them ſhould be the others Heir, and died. Then James died without Iſſue, then died William, leaving Iſſue Robert under whom the Defendant Claims, upon whom Anthony entred and made the Leaſe, upon whom the Defendant re-entred. And it was adjudged that the Plaintiff ſhould be barred; for, the laſt Clauſe that William and Anthony ſhould be one anothers Heirs, was to be applied to the firſt Clauſe of the Diviſion of Twenty Acres between them (though the Gift to James, and ſo to William for the Lands in Queſtion came between) and could not be applied to that Part, becauſe that laſt Part was reciprocal for Lands, either of them might take from other, which fitted well the Twenty Acres, becauſe William might take from Anthony by Survivor, as well as Anthony from William, which could not be ſo in the Lands given to James and ſo to William, for William could take no Part of them from Anthony.

Then touching thoſe, ſince there was no Eſtate Tail given to James, and that for Default of Iſſue William ſhould be his Heir, that gave William an Eſtate of Inheritance, either in Fee-ſimple, or ſuch in Tail as James had.

1 Leo. 166. Noy. 48. 3 Cro. 163. 1 And. 381.

For though none can be truly Heir, but he that the Law makes ſo, yet there is an Heir by Appellation and vulgar Acceptance, which intimates the State of a true Heir. And therefore if by my Will I appoint that I. S. ſhall be Heir of my Land, he ſhall have it in Fee, for ſuch Eſtate as the Anceſtor hath, ſuch he is to Inherit. And therefore the ſaid Word [Heir] in the latter Clauſe between William and Anthony ſhall give him an Eſtate for Life to the Survivor, becauſe the Brother to whom he is made Heir, had but an Eſtate for Term of Life before.

Ante. 34. Latch. 9.

The Word Heir how it ſhall be taken in a Will.

(94) Vernon *verſus* Onſlow. Debt.

VErnon brought an Action of Debt againſt Onſlow upon an Obligation, and Demands Eighty Pounds, and upon Oyer of the Obligation, it was found teneri & firmiter obligari in Octogeſimo Libris.

1 Brnl. 62. Mo. 864. P. 12 Jac. Ror. 2047. *alias* 2407. *Octogeſimo* for *Octoginta*. 2 Ro. 147. Ant. 18, 19, 20. Ap. 116, 119.

(95) Bray *verſus* Hayne. Caſe.

An Action for Words, for ſaying, thou ſelleſt by falſe Meaſure. 1 Brnl. 4. 2 Cr. 339, 141. 3 Cr. 95. Cr. Car. 417.

BRay brought an Action of the Caſe againſt Hayne, and declared, that where he had been Bailiff to Sir William M. Knight, for three Years laſt paſt, of his Land in C. and had the ſelling of his Corn and Grain, that the Defendant had ſaid theſe Words unto him [Thou art a couſening Knave, and thou haſt couſened me in ſelling falſe Meaſure in my Barly, and the Country is bound to curſe thee for ſelling with falſe Meaſures, and I will prove it, and thou haſt changed my Barly.] Upon not Guilty a Verdict was found for the Plaintiff.

And yet Judgment was given againſt him that thoſe Words bear no Action: For every Falſhood charged upon a Man in his private Dealings will not bear Action: But if a Man of a publick Occupation or Trade be charged with Deceit in that it will bear an Action. And therefore if this Man had been a common Ridder or Badger; and had been charged with ſelling by falſe Meaſure, it would have born Action, and I was of Opinion, and ſo I am, that if I have a Bailiff, to whom I commit the buying and ſelling of my Corn and Grain, and give him the greater Wages, in reſpect of that Truſt and Employment, and then a Man will charge him to have deceived me in his Office, by buying and ſelling by falſe Meaſure, to my Loſs or Damage, this will bear an Action, for this diſcredits him in his Means of living: And this Kind of Offence may not only be Cauſe to put him out of that Service, but to be refuſed of all others. But that could not be applied to this Caſe, for it doth not appear that theſe Words were ſpoken of any Sale of Corn whilſt he was Bailiff, nor of his Maſters Corn, nor to the Damage of his Maſter.

1 Cr. 563. 2 Cr. 504.

2 Cro. 563.

Cr. Car. 480.

(96) Parker *verſus* Parker.

M. 12 Jac. Rot. 547. Hill. 12 Jac. Rot. 426. Amendment cannot be of an imparlance Roll. 1 Cr. 92. Brownl. 1. R. 9. Apr. 246, 251. Cr. Car. 46. Hetl. 59. Mo. 892. Poſt. 541. Hutt. 84. Meſme Ca.

Hutt. 82, 83, 92. 2 Cr. 83, 105, 311, 415, 498, 225, 537.

PArker brought an Action of the Caſe upon a Trover and Converſion againſt Parker, and the Declaration upon the Imparlance Roll had ſpaces for the Day and Year, of Loſing, Finding, and Converſion of the Goods, but the Iſſue Roll, and all the reſt were perfect in this Point.

And the Court was of Opinion, that the Imparlance Roll could not be amended, and made Perfect by the Iſſue Roll, becauſe it was the Original, and was to warrant the other, and not è converſo. But yet becauſe upon Iſſue not Guilty, Verdict was given for the Plaintiff; this Court gave Judgment for him, becauſe the Declaration, as it was found in the Imparlance Roll, was good enough in Matter, for the Trover and Converſion was laid in the Preterperfect Tenſe, and ſo before the Action brought, and ſo the Fault in the Declaration being but in Form, was holpen by the Statute of Jeoffails.

(97) Banks *verſus* Parker. Treſpaſs.

Brnl. 1. 233. Iſſue *de injuria*, holpen by the Statute. 8 Co. 66.

AN Action of Treſpaſs was brought for taking of a Kettle at Weſtowne, the Defendant juſtified by Reaſon of a Cuſtom in the Manor of Tiddeſewell, and the Plaintiff joined Iſſue de injuria ſua propria abſque tali cauſa. The Ven. fac. was awarded de vicineto de Weſtowne & manerio de Tiddeſewell by the Roll, and a Verdict for the Plaintiff, and though the Plaintiff ſhould not have traverſed the Cauſe generally, but the Cuſtom, yet that was judged holpen by the Statute of Jeoffails as Matter of Form, becauſe abſque tali cauſa contained the Cuſtom and more, but becauſe the Sheriff had returned his Pannel de vicineto de Weſtowne only, that was incurable, though it were moved, that the Award was by the Roll de vicineto de Weſtowne and Manor both. Alſo the Ven. fac. might be amended according to the Roll. It was denied, and reſolved for two Reaſons. Firſt, that it ought not to be from Weſtowne at all, becauſe the taking was confeſſed on both Sides, ſo that required no Trial, but the Cauſe only was controverted, which was the Cuſtom; and other Things ariſing from the Manor of Tiddeſewell. And though the Roll had been perfect from the Manor only (as it ought to have been)

4 Le. 232.

Viſne muſt be neither too large, nor too ſtrait. 1 Syd. 19. Accord.

been) ſo that the Ven. fac. might have been amended by Warrant of it (if nothing had been done upon it) yet now when it appears to the Court, that the Trial was not had by ſuch a Jury, as the Roll and the Law required, to the Prejudice of the Truth in Shew, it ought not to be allowed, and therefore not to be amended.

Amendment muſt not alter Truth, and do Wrong.

(98) Auſten *verſus* Gervas.

IN the Aſſumpſit before, by Auſten Plaintiff againſt Gervas, Judgment was given againſt the Plaintiff, becauſe he did not Aver, that he did offer the Bond ready ſealed, and to deliver the ſame to the ſaid Gervas, neither did ſet down the Sum, in which he ſhould be bound for the ſame Ten Pounds, for though it were expreſly in the Conſideration laid only, that he ſhould be bound for the Payment, yet the Law required, that he ſhould be bound in a competent Sum, which is under the Judgment of the Court, and therefore muſt be pleaded expreſly, that the Court may Judge of it.

It was further moved, that the Conſideration of the Money payed in Hand by the Plaintiff, being an Infant, was void. But to that I anſwered, that becauſe it was delivered by his own Hands, it was but voidable to be recovered again by an Action of Account.

1 Ro. 19. Ante 69. Yel. 44, 49. 2 Cro. 116, 652.

(99) Swinfeild's *Caſe.*

UPon Occaſion of a Prohibition ſued by Swinfeild Executor of Swinfeild againſt Iveatt to the Court of Requeſts.

Brownlowe remembred the Court, that the Prohibition did not uſe to ſtile it by the Name of a Court, but did deliver it thus; that the Party did prefer a Bill to the Maſters of Requeſts, and therefore it was appointed that the Form ſhould be ſtill obſerved.

Court of Requeſts not ſo ſtiled.

(100) Adrian Coote *verſus* Adrian Gilbert. Caſe.

ADrian Coote brought an Action upon the Caſe againſt Adrian Gilbert, for ſaying [thou art a Thief, and haſt ſtollen a Tree.] Iſſue not guilty, and found for the Plaintiff, and yet it was adjudged againſt him, for the ſpecial Words, though they come under the Word [and] are in common Senſe to be underſtood, to be but a verifying and making good of the general Word [Thief] and then [a Tree] ſhall be underſtood rather a Tree ſtanding than felled, which is Wood, and the Law ſtrains not to hurt but to heal: Yet Towſe cited a Judgment in the King's Bench, 7 Jac. given for the Plaintiff upon theſe Words: [Thou art a Thief, and haſt ſtolen Trees out of I. S. his Orchard, and I have ſpent one Hundred Pounds, and I will ſpend another to hang thee.] Which Caſe we allowed not, though it were ſomewhat ſtronger than the Cauſe at the Bar.

So note, Words are taken beſt for the Speaker, yea, and though ſome cannot ſtand with that Conſtruction, as here the Word [ſtolen] ſo there is one Rule for Deeds, another for Words, Note that.

Brownl. 1. R. 2. Godb. 241. Hill. 10 Jac. Rot. 3176. Paſt. 331. 2 Cro. 166, 39, 442, 231. Ant. 9. Action for Words for ſaying, thou art a Thief, and haſt ſtoln a Tree. 2 Ro. R. 440. Styl. 114. 2 Cro. 66, 114. 1 Roll. 51. Expoſition of Words according to the beſt Senſe. 2 Cro. 674. Styles 24. *Arbor dum creſcit Lignum dum creſcere neſcit.* 2 Cr. 154, 166, 231. Noy. 135.

(101) Owen an Attorney *verſus Mr.* Holt *of* Grayes-Inn.

Obligation.

OWen an Attorney of this Court ſued Maſter Holt of Grays-Inn upon a Bond of Eighty Pounds, Maſter Holt exhibited a Bill againſt him in the Dutchy Court, to be relieved in way of Equity, pretending that it was made concerning an Extent of Land, lying within the County Palatine of Lancaſter, and ſome Cauſe of Equity in it: whereupon the Court awarded a Prohibition, becauſe the Dutchy Court hath no Juriſdiction in reſpect of the Perſon, as becauſe the Perſons Suitors dwell within the County palatine of Lancaſter, nor upon the Lands of the Subject any where,

Dutchy Court their Juriſdiction. Roll. 2. Ab. 1. 318. 1 Roll. 539

Prohibition to the Dutchy Court.

where, but upon the King's own Lands, and his own Revenue, and perhaps upon Bonds and Aſſurances given for his Revenue of the Dutchy. Whereupon Holt being Preſent, finding the Opinion of the Court, ſaid he would ſurceaſe his Suit there without Writ. And ſo the Court compounded the Cauſe.

(102) Saint John *againſt* Saint John. Debt.

Action on the Statute 21 H. 6. for not returning one Burgeſs.

SAint John brought an Action of Debt for Forty Pounds againſt Saint John Bailiff of Stockbridge, upon the Statute of 21 H. 6. for not returning him Burgeſs of the ſame Town, for the laſt intended Parliament. And where the Words of the Statute are, that the Sheriff ſhall ſend his Precept to the Mayor, if there be no Mayor, then to the Bailiff: The Plaintiff declared, that the Sheriff had made his Precept unto the Bailiff, without averring that there was no Mayor. And now after a Verdict for the Plaintiff, this was moved in Arreſt of Judgment. But the Court was of Opinion clearly, that it was good, for we ſhall not intend that there is a Mayor except it be ſhewed, and if there were one it ſhould come properly in the other Side.

1 Ro. 29. Pl. 1. Poſt. 111.

And though the Parliament was as none, becauſe there was no Act nor Record of it, yet this Action may lie, for there was a Return of the Writs, and many Sittings.

Admiralty.

(103) Don Diego Serviento de Acuna Embaſſador Leiger for the King of Spain, *againſt* Jolliff *and* Tucker, *and* Sir Richard Bingley.

2 Saund. 260. Ceſt Caſe eſt Denie eſtre Ley per Curiam. 13 R. 2. cap. 5. Prohibition to the Admiralty for Cauſe not done at Sea. Admiralty Court holds Plea of Things at Land.

DOn Diego Serviento de Acuna Embaſſador Leiger for the King of Spain libelled in the Admiralty Court, as Procurator general for all his Maſters Subjects, againſt one Jolliff and Tucker, and againſt Sir Richard Bingley for two Ships, and their Lading of divers Kinds of Goods of the Subjects of the King of Spain generally, and not naming them adduct' ad Port de Munſter, in the Preface of the Libel generally againſt them all, and then Proceeds, and charged them ſeverally thus: That Jolliff, and Tucker Captain, Piratæ in alto mari, more bellico dictas naves aggreſſi ſunt, & per vim & violentiam took them, and that they were adductæ in partes Hiberniæ, and that they came to the Hands of Sir Richard Bingley, and he converted them to his own Uſe (not ſaying where) and refuſeth to render them being required, &c. Hereupon Sir Richard Bingley prayed a Prohibition, and two Days were given to the Embaſſador's Counſel: And now Montague the King's Serjeant for the Embaſſador, ſaid, that he could not ſue for theſe Goods at Common Law, becauſe he was not Proprietary.

Poſt. 112.

3 Cro. 685.

Secondly, that Piracy did not change Property, no more than Theft at Land.

2 Saund. 260. Utra.

Thirdly, that the Cauſe begun at Sea, and therefore originally belonged to the Admiralty. But all this notwithſtanding, the Court with full and clear Conſent awarded a Prohibition for that Part of the Suit only that concerned Sir Richard Bingley, allowing clearly, that they might proceed againſt Jolliff and Tucker for that Part of the Suit, that did diſtinctly concern them, becauſe it was laid down upon the High Sea. But becauſe Sir Richard Bingley is not ſaid to have had any Hand in the firſt taking at Sea, but apart by himſelf, in that the Goods came after to his Hands, and were converted by him to his own Uſe, which is his particular Charge, that Part of the Suit belongs not to the Admirals Court, becauſe it is not laid to be done at Sea. Nay, more, it is ſo laid in the Libel, as it muſt needs be underſtood to be done in the Port of Munſter, or at Land in Ireland; for it is ſaid, that they were brought ad partes Hiberniæ (not maris Hibernici) ſo it muſt be underſtood upon the Continent, and then follows, that they came to Bingley's Hand, which muſt be underſtood there, no other Place being aſſigned.

2

Now

• Now the whole Court reſolved clearly, that the Admiralty of England can hold no Plea of any Contract, but ſuch as riſeth upon the Sea: No, though it riſe upon any Continent, Port, or Haven in the World, out of the King's Dominions, for their Juriſdiction is limited by the Statutes to the Seas only; for the Admiral is for the Sea, and the Court for Maritime Cauſes. And therefore if any Stranger or other will ſeek Juſtice at the Hands of the King of England, for Wrongs done him out of his Dominions, he muſt ſeek it in thoſe Courts that have Juriſdiction over the Cauſe. Now if the Cauſe riſe at Land, or in a Port (for no Port is Part of the Sea, but of the Continent) then he cannot ſue in the Admiralty, but he muſt ſue in the Courts of Common Law, which have unlimited Power in Cauſes Tranſitory. And then it muſt be ſo laid, that it may give Juriſdiction. And this Suit againſt Bingley is no other than a meer Action of Trover and Converſion, as Bawtry and others of the Serjeants confeſſed. Mo. 814. Ant. 11.

Now to the Objections.

To the firſt: The Cauſe being laid at Land no Man may by a new found Form of Suit draw it ad aliud examen, but he muſt ſubmit his Forms to the Law, and not econtra. 1.

To the ſecond: The original Charge is not Piracy, for though he calls them Pirates, yet the Charge of taking the Goods is only per vim & violentiam, as to the taking of the Goods, and the Proceeding is civil, not criminal. And if it were laid Piracy. All that ſhould come in upon Evidence, the Trover and Converſion would be the Property, Taking and Converſion. And if it were Piracy indeed, yet Buying in an open Market without Fraud would defend the Buyer. And now the Queſtion is not, who hath Right, but where the Right ſhall be tried. 2.

To the third: Bingley's Charge ſtands by it ſelf, as one at Land, and [Juſtice Warberton] ſaid, that the Death of a Man in great Ships might be tried either before Judges at Land by the Common Law, or before the Admiral, by the ſpecial Law in that Behalf. And this Prohibition was the rather allowed to Bingley, becauſe it was prayed before any Proceedings in the Admiralty, further than the Libel, which in it ſelf warranted the Prohibition. Vide reſiduum infra. 113, 114. 3.

And note, that the ſame Day Sir John Watts, Captain Newport, and others, prayed a Prohibition in the Caſes of Monſieur Villiers, Governor of Deepe, for Spoil done at Cape de Vert, which they would have ſurmiſed to have been done at Land at Guiney: But becauſe it did not appear ſo in the Libel, and becauſe they had ſuffered it to proceed to Sentence, it was denied, and they left to their Remedy upon the Statute, if there were Cauſe. M. 9. Jac. 1 Syd. 65. Noy. 67. 12. Co. 77. 2 Cr. 419. 1 Ro. 80. 1 Cr. 97. 3 Cr. 595.

(104) Palmer *verſus* Pope. Admiralty.

Co. B.
M. 9 Jac.
Prohibition to the Admiralty. Conuſans 37.
Poſt. 212. 12 Co. 103.

PAlmer libelled in the Admiralty for an Agreement made at Sea, for well tranſporting of Sugars, againſt Pope, and that the Agreement was put in Writing in Barbary, and that the Sugars were ſpoiled at Sea: And hereupon a Prohibition was granted; but if the Writing had not been at Land, under Seal, but a ſimple Remembrance of the Agreement, it had been otherwiſe: 48 E. 3. 2. F. N. B. 118. g. 10 H. 7. Temps E. 1. Avowry 192. 8 E. 2. 45 E. 3. 7. R. 2. Statham. 5 H. 6. 2 H. 4. 6. H. 6. And the Stat. primos pontes is only for Death and Mayhem, and Sir John Watts had a Prohibition againſt Alanſo de Valoſce Embaſſador of Spain, for Attaching of Tobacco at Land here, which one Corvero Subject to the King of Spain brought hither, and which the Embaſſador libelled to belong to his Maſter as confiſcated, as all other his Goods were, for the Property of Goods here at Land muſt be tried by the Common Law, however the Property be guided. M. 9 Jac.

Alſo Jennings libelled in the Admiralty againſt one Audley, upon a Contract ſaid to be made apud Malaga inter diſtrictum Maris vocat. the Straights of Gibralter infra Juriſdictionem maritimam: And becauſe it appeared the Contract Poſt. 213.

Contract was made at the Island of Malaga, Prohibition was granted, for it was not regarded, that he added infra Jurisdictionem maritimam, which appeared contrary. Vide infra. 212.

(105) Newman *versus* Moore. Second Deliverance.

Southampton. Waller. Tr. 23 Jac. Rot. 3382. Mo. 870. Post. 103. 2 Cro. 424. m. 1 Roll. 670. m. Winch. Ent. 1003.

THomas Newman brought a second Deliverance against Nicholas Moore for taking his Beasts at Froyle in quodam loco vocat. Brock's Close: The Defendant avows the Taking, and shews that Sir Pexal Brocas was seised of the Place, inter alia, in his Demesne as of Fee, and held the same of the late Queen in chief, and so Seised, devised a Rent of Ten Pounds a Year out of the said Lands to the said Nicholas Moore for the Term of his Life with a Clause of Distress, and likewise devised two Parts of the Land unto the now Pexal Brocas and the Heirs of his Body, and that he distrained the Beasts of the Plaintiff in the two Parts of the said Close, as for the Rent behind, the Plaintiff confesseth the Seisin, Tenure, and Devise, and conveyed the third Part to four Heirs, whereof one Becket was one, and then conveyed the fourth Part being the Twelfth Part of the whole to one Jepson, who demised the Twelfth Part unto him, by Force whereof he was of the Twelfth Part possessed, and so possessed put in his Beasts into the said Twelfth Part, and the Defendant took them.

Devise of Rent of all the Land holden in chief.

The Avowant conveyed unto the said Jepson, as well the two Parts devised as the said Twelfth Part, and then shews, that Jepson did Demise both the one and the other to the Plaintiff, by Force whereof he was possessed of both, and so possessed put in his Beasts, absque hoc quod prædictus Thomas Newman de præd. 12 parte tenement. præd. cum pertinentiis in Froyl prædict' tantum pessessionat' existens posuit Averia sua præd. in præd. triginta Acris pasturæ cum pertinentiis, &c. in quibus, & sicut idem Thomas superius allegavit. Hereupon the Plaintiff demurred in Law, and for Cause of Demurrer shewed, that the Avowant had both confessed, avoided, and traversed the Plaintiff's Plea, and also that he had traversed that which the Plaintiff had not alledged, scil. the tantum. And it was without Argument ruled, that the Devise of the Rent, by the Name, out of all the Lands, was good as out of the two Parts only, by the Meaning of the Statute against the Opinion obiter in Butler's Case and Baker's, as it had been formerly adjudged upon the same Will between Eustace Barton Plaintiff, and the same Nicholas Moore Avowant in the Common Pleas, Trin. 6 Jac. Reg. Rot. 707. which is the Case reported by my Lord Coke lib. 8. 83. b.

Traverse, Confession, and Avoidance. 1 Ro. 221.

Co. L. 111. b. 3 Co. 33. a. b. 8 Co. 84. b.

But for the Form of the Traverse it was argued to be naught, because the Avowant had confessed as much as the Plaintiff had pleaded, that is to say, the Lease of the Twelfth Part, and then added the Lease of the two Parts, which stood well with the Plaintiff's Plea, and did avoid it, and therefore he should have rested there; and then the Traverse should have come on the other Side to that Lease of the two Parts. For now it was said, that the Issue upon this Traverse might put the Plaintiff to a Mischief, for if he were possessed of more than of the third Part discharged, then so much as he pleads it should be found against him, and yet he were not to be charged. And yet the Plea was holden good, and Judgment given for the Avowant. For it was shewed to the Court, that in the former Case between Barton and Moore, the Pleading was altogether the same with this, the same Traverse and Demurrer, with the Clause especially assigned, as it was here, and the Point argued, and afterward by the Order of the Court: over-ruled and left, and Commanded to argue only the Matter in Law, which was also adjudged for Moore the Avowant, though in the Report of the Case there is no Mention made of this Point of the Traverse.

Traverse upon Traverses. 1 Saund. 207. Accord. Vaugh. 56. Accord.

Now for the Objection made against this Traverse, which makes a Shew, I declared my Opinion, that if it had been found upon Issue taken upon the Traverse, that the Plaintiff had been possessed of more than the Twelfth Part

Part of the Land diſcharged as of the full third Part or the like, and of no Part of the reſt of the Land charged, that it had been found for the Plaintiff.

For upon the diſcloſing of the Caſe it appears plainly, that the Effect and End of the Iſſue is, whether he were poſſeſſed only of Land diſcharged, or as well of Land charged as diſcharged, and not of what Part of thoſe Lands, for that is not the Subſtance, though it be the Letter of the Iſſue.

It was alſo ſaid, that every Man will be preſumed to know his own Caſe, and ſo it ſhall be accounted his Folly if he have miſtaken his Part. But yet it was agreed by the whole Court, that the Avowant might have reſted upon his Plea, as a Confeſſion and Avoidance without the Traverſe; and that the Traverſe might better have come on the Plaintiff's Side.

And therefore I am of Opinion, that ſince the Confeſſion and Avoidance was of the ſame Effect and Conſequence with the Traverſe and ſo Surpluſage, though it were no juſt Cauſe of Demurrer, yet the Plaintiff might have waved that Traverſe, and maintained his Poſſeſſion of the Part diſcharged, abſque hoc, that he was poſſeſſed of the part charged, modo & forma prout, and ſo the Iſſue would have riſen upon his Traverſe Material, not upon the others Immaterial. Poſt. 103.

(106) Stoner *verſus* Gibſon. Obligation.

SToner Adminiſtrator Plaintiff, againſt Gibſon Defendant, in an Action of Debt upon an Obligation; the Defendant pleaded that the Obligation was with Condition for Performance of Covenants of a Deed Poll, and pleaded that he had performed them all, not ſhewing what they were. Whereupon the Plaintiff demurred in Law, and the Plea upon the Demurrer was adjourned from Octab. Mich. laſt to this Octab. Hillar. at which Day the Defendant pleaded, that ſince the laſt Continuance, ſcil. ſince Octab. Mich. laſt, from which Day the ſaid Plea was continued till this Octab. Hillar. the Plaintiff's Adminiſtration was revoked and committed to the Defendant. Term. Hill. 13 Jac. Reg. pleading of Covenants in a Deed Poll. Moor f. 871. m. Ca. Dy. 201. 1 Buls. 92.

And it was agreed, that upon theſe Adjournments and Continuances of Demurrers, the Plaintiff might be Non-ſuit at the Day in another Term, whereunto it is adjourned, and by the ſame Reaſon he may plead a Plea puis darrein continuance. And it was alſo agreed, that if he or the Plaintiff ſhould here take Iſſue, or Demurr upon this Plea, yet the Court muſt conſider alſo upon the firſt Demurrer; for if upon that ſtanding confeſſed by the Demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, howſoever the latter Iſſue or Demurrer paſs. But otherwiſe it were if the firſt had been an Iſſue, for then nothing were confeſſed to his Prejudice, and then that had been utterly relinquiſhed by a ſecond Iſſue or Demurrer; Quære. Carter's R. f. 134. Plea *puis darrein* continuance after Demurrer or Iſſue. 2 Cr. 35, 317. 3 Le. 28. Dy. 226. Pl. 40.

(107) Cuddington *verſus* Wilkins. Caſe.

CUddington brought an Action of the Caſe againſt Wilkins, and declared, that 1 Martii 10 Jac. the Defendant had ſpoken to him theſe Words, viz. He (meaning the Plaintiff) is a Thief, and why will you take his Part? To which the Defendant pleaded, that 1 Auguſti 36 Eliz. the Plaintiff did ſteal ſix Sheep of one I. S. by Force whereof &c. and ſo he juſtifieth them. The Plaintiff by Proteſtation ſaith, that he ſtole not the Sheep, and pleads the general Pardon 7 Jac. and avers that he is none of the Perſons excepted. Whereupon the Defendant demurred in Law. And now this Term it was adjudged for the Plaintiff, for the whole Court were of Opinion, that though he were a Thief once, yet when the Pardon came, it took away not only, pœnam, but reatum, for Felony is contra Coronam & dignitatem Regis. Now when the King had diſcharged it and pardoned him of it, he hath cleared the Perſon of the Crime and Infamy, wherein no private Perſon is intereſſed but the Common-wealth, whereof he is the Head, and in whom all general Wrongs reſide, and to whom the Reformation of all general Wrongs belongs. And therefore Suits for Defamation by private Ante 67. Trin. 13 Jac. Ror. 933. Calling a Man Thief after a Pardon general or ſpecial. Mo. 863, 872. Poſt. 294. Latch. 81. Ant. 67. Act. ſur Caſe B. 104. 2 Brnl. 47. Syd. 52. 5 Co. 47. a. Co. 6. 13. b. 14. a.

5 Co. 50.

Perſons in Spiritual Courts are pardonable by the King, even after Sentence, becauſe though they be ſued ſometime by the Party grieved, yet he is not but in the nature of an Informer, and the Sentence is not to give him amends but pro ſalute animæ, for Examples ſake. And ſo are the Suits in the Star-Chamber. And to ſhew the Force of the Kings Pardon, the Chief Juſtice then cited two Books, 1 and 2 E. 3. Fitz. Corone 281. 154. wherein it is adjudged, that if in an Appeal of Felony, the Defendant do offer Trial by Battle, the Plaintiff may counterplead it, by ſaying the Defendant being apprehended eſcaped, or brake Priſon, which preſumes a guiltineſs. And yet thoſe Books are ruled, that if the King Pardon that Breaking of Priſon, the Defendant ſhall be reſtored to the Battel, and the Counterplea taken away. And yet the Reaſon of the Preſumption of the Guiltineſs is the ſame after Pardon as it was before. But the Reaſon of the Caſe is, that the King's Pardon doth not only clear the Offence it ſelf, but all the Dependencies, Penalties, and Diſabilities incident unto it, and that againſt the Appellant. For though the Appellant hath an Intereſt in the original Fact, which the King would not diſcharge as againſt him, yet in the breaking of the Priſon he had none but oblique. And it was ſaid, that he could no more call him Thief, in the preſent Tenſe, than to ſay a Man hath the Pox, or is a Villain after he be cured or manumiſſed, but that he had been a Thief or Villain he might ſay. And it was held no great Difference, though this had been a ſpecial Pardon, and not known to the Defendant, for he muſt take heed at his Peril that he do no Man Wrong. And there is no Neceſſity nor Uſe of ſlanderous Words to be allowed to Ignorants. But it may well be, that if a Man had committed Felony, and got a ſecret Pardon, yet another Man not knowing of the Pardon may juſtify the Apprehending of him for Felony, becauſe it is Advancement of Juſtice; even as a common Voice and Fame is a ſufficient Warrant to arreſt for Felony, though the ſame be not true: But ſo it is not to call him Thief, for that is neither neceſſary nor advanceth nor tends to Juſtice: Vide reſiduum ſupra, ſee for the Force of a Pardon in Parliament, C. lib. 8. 13, 14. and my Diſcourſe upon it there.

Ant. 67. Charter d' Pardon, B. 2.

5 Co. 47. a. 6 Co. 13. b. 14. a.

Cr. Jac. 578.

Ant. 67. Syd. 52. Common Fame a ſufficient Warrant to arreſt for Felony. London.

1 Syd. 52. Falſe Impriſonment, B. 16.

Hill. 10 Jac. Rot. 1763 (108) Sir Richard Grobham Knight, *againſt* Thornborough.

An Action of Debt brought upon a Leaſe. 7 Co. 56. b. 1 Ro. 459. 1 Brnl. 75. Goldsb. 129 Statute Merchant, Br. 41.

SIr Richard Grobham brought an Action of Debt of 100 Pounds againſt Thornborough and others, and declared upon a Leaſe made at London of the Manor of Leckford Richards, in the County of Southampton, and of a Capital Meſſuage in the ſame County of Southampton, and four Cloſes Paſture to the ſame Meſſuage adjoining, lying in Leckford in the ſame County of Southampton, &c. rendring 120 Pounds a Year, with a nomine pœnæ of 8 Shillings a Day for Non-payment, and then ſhews that 60 Pounds was behind for half the Year, at ſuch a Feaſt, and ſo remained behind by the Space of a Hundred Days, making 40 Pounds, ſo together the 100 Pounds. The Defendant confeſſed the Demiſe, and pleaded an Extent of the Land by a Stranger, upon a Statute acknowledged before the Demiſe; but ſhews that the Liberate was executed after the Rent due, whereupon the Plaintiff demurred, and Judgment was given for him for the 60 Pounds Rent, becauſe it was due before the Liberate executed.

Nomine pœnæ is not forfeited without Demand. Poſt. 133. Hutt. 23. An 100 *l.* demanded, Part for Rent, Part for Pain, Judgment is divided. Extent charge not Poſſeſſion till Liberate. Cr. Car. 149. 2 Le. 21, 28. 2 Cr. 25. 3 Cro. 906. 478. Poſt. 89. Tender, B. 20, 43. Cr. Jac. 618. Cr. El. 363. 2 Cro. 125, 365.

And though the Leaſe were ill laid in the Declaration, in as much as the Capital Meſſuage is laid in no Town, but in the County at large, neither can be holpen by the Town ſet for the four Cloſes, for the Sentence is perfected for the Houſe and finiſhed before; yet that Fault being but Want of Viſne is cured, becauſe the Defendant hath confeſſed the Leaſe.

* Want of Viſne hurts not where the Adverſary confeſſeth the Matter. 2 Cro. 125. 1 Roll. 459. Mo. 358. Poſt. 153, 133, 331. See infra 89. fol. *Riches* Caſe: Obſerve the Reaſon of the Difference. 2 Ca. 20, 128, 686.

* But for the 40 Pounds Pain, it was adjudged againſt the Plaintiff, becauſe he laid no actual Demand of his Rent at the Day, without which a Pain is not forfeited. Though a Demurrer confeſs the Fact well pleaded, yet if the Defendant here had demurred, he might have taken Advantage of the ill laying, but here the Defendant did both admit the Leaſe by pleading the Extent to defeat it, and yet more did confeſs it directly by a bene & verum, &c. And a Leaſe ſo made is good.

(109) Thomas Virely *againſt* Roger Gunſtone.

THomas Virely brought an Action of the Caſe againſt Roger Gunſtone Clerk in the King's Bench, for calling him perjured Fellow, and had Judgment by nihil dicit: And thereupon had a Writ of Enquiry of Damages to the Sheriff of Norfolk, thus: Præceptum eſt Vic. quod per ſacramentum duodecim proborum & legalium hominum de Balliva ſua diligenter inquirat quæ damna, &c. Whereupon the Sheriff returned, Quod mandavit Johanni Geſtingham Ballivo libertatis Rad. Hare mil. Hundredi de Blackcloſe cui execut. præd. brev. totaliter reſtat. fiend. & quod alibi infra Com. præd. per ſe fieri non potuit. Qui quidem Ballivus ſic ſibi reſpondit. And ſo ſets down an Inquiſition before the Bailiff, and Forty Pounds Damages. Hereupon a Writ of Error was brought into the Exchеq. Chamber, and agreed by all the Judges, that the Return was Inſufficient, for it was apparently untrue, and againſt Law, becauſe the Warrant was directed to the Sheriff himſelf to be executed in any Part of his Shire, and no Venue contained in this Inqueſt of Office, as there is in other Writs, which intitles the Bailiffs of Liberties. But yet the Court would not reverſe the Judgment, becauſe there were divers of the like, both in the King's Bench and Common Pleas, eſpecially in Suffolk and Norfolk in later Times.

Norfolk. H. 13 Jac. & T. 12 Jac. Rot. 252. Checq. Cham. Perjur'd Fellow. 1 Cr. 319. 4 Co. 65. b.

Breif de Br. 19. Inquiry of Damages by Enqueſt of Office by a Baily of Liberty.

Return of a Sheriff falſe in Law.

2 Cro. 319.

(110) Slawney's *Caſe.* Co. Ba.

IN the Prerogative Court, Sir John Bennet the Judge, according to the Cuſtom, hath taken Bonds of one Slawney, upon granting of an Adminiſtration upon the Condition uſual there; whereof one is, that the Adminiſtrator ſhall diſpoſe of the Surpluſage of the Goods after the Debts and Legacies paid according to the direction of the Court. Whereupon, the Inteſtate having left a Wife, to whom the Adminiſtration was committed, the Judge did now find a Surpluſage in her Hands, and did Sentence that ſhe ſhould give certain Portions to certain of the kindred of her Husband, being not his Children, whereupon a Prohibition was prayed in her behalf. And the Court was of clear Opinion, that whereas the Stat. of 21 H. 8. appoints the Adminiſtration to be granted, &c. And that the Ordinary ſhall take Sureties for the Adminiſtration of the Goods of the Dead, that the Ordinary may not impoſe any other or further Condition upon the Bond, and though the Ordinary will pretend that the true Adminiſtration mentioned in the Statute is to be extended as well to the Diſpoſition of the Surpluſage, as to the Debts and Legacies, yet that is not under their Judgment, for they muſt take their Bond according to the Law; and when it is ſued the Meaning and Expoſition of the Statute, and of the Condition of the Obligation, both are to be judged by the Courts of Common Law. And I ſaid, that if a Man obſerve well the Statute of 21 H. 8. cap. 5. he ſhall perceive by preferring the Wife and Children to the Adminiſtration that the Statute did imitate the Mind of the Inteſtate to prefer them, that it is like he would have preferred, if he had made a Will, which muſt be by giving the Profit of the Eſtate, and not only Labour and Dolour, in ſuing, and being ſued, to bring in and defend the Eſtate, and then to give this vaſt Power to the Ordinary to give the Surpluſage where he will. To which Opinion and Reaſon the reſt of the Judges did incline. Infra. 191.

But yet the Cauſe, with the Conſent of Sir John Bennet himſelf was referred to the Order of Serjeant Harris and Hutton, who were of Counſel for the Prohibition.

Paſch. 19 Jac. in Co. B. it was adjudged, &c. That after an Adminiſtration committed, the Ordinary hath not Power to diſpoſe of the reſt of the Goods to the Children of the Inteſtate, but by the Intent of the Stat. of 21 H. 8. they ſhall remain to the Adminiſtrator. 1 Cro. 202. V. *Winch* Reports 11. The Power of the Ordinary upon the Surpluſage of the Goods of the Inteſtate. Swinb. 154. 1 Brol. 31, 32. Moor, 1. 864. Meſme Ca. Palm. 527. 1 Cr. 62, 20. Hetly, 68. Poſt. 191, 84. Jones, 228. Winch, 11. Poſt. 191. Accord, Mes ceo ore eſt. altered per Stat. 22 & 23 Car. 2. Cap. 10. de Diſtributions.

Carter's R. f. 125. Noy, R. f. 83.

Hetly, 68.

(111) Spendlow *againſt* Sir William Smith.

Dilapidations. 3 Inſt. 43. Ant. 83. 2 Ro. 305.

SPendlow Parſon of Skiton in Norfolk ſues Sir William Smith of Eſſex Executor of one Smith the laſt Parſon there for Dilapidations, in the Arches. And among other things, there was a Queſtion about a Leaſe for Years, which was alledged to be taken by Sir William Smith in his own Name, but covenouſly in Truſt, and for the Uſe of the ſaid Smith the Parſon, whereupon they would put Sir William Smith to his Oath, to anſwer concerning the Covin; whereupon the Court granted a Prohibition quoad Examining of him upon his Oath concerning the Covin; for though the original Cauſe belong to their Cognizance, yet the Covin and Fraud is Criminal; and the Avowing of it to be bona fide is puniſhable, both in the Star-Chamber, and by the penal Law of fraudulent Gifts, and therefore not to be extorted out of himſelf by his Oath. Alſo the Expoſition of the Statute 13 Eliz. cap. 10. of Dilapidations, and what ſhall be Covin or not within the Law, reſts not in them to judge, but in the Courts of Common Law.

2 Cr. 388. 12 Co. 27. 2 Inſt. 614. Buls. 3d R. f. 48. Ro. 1. R. 337. 2 Cro. 388. 1 Co. 42. Moor, 840. Court Eccleſiaſtical cannot examine a Delinquent upon Oath.

Court Eccleſiaſtical cannot interpret a Statute. Noy. 151.

(112) Edward Skeat *againſt* Oxenbride *and* Etheldred his Wife.

Waſte. Surrey. Tr. 12 Jac. Regis. Rot. 489. Mo. 871. 1 Brnl. 241. 3 Cr. 46.

EDward Skeat brought an Action of Waſte againſt Oxenbridge and Ethelred his Wife, and the Writ was De omnibus terris & Gardinis in L. de quibus Edwardus Skeat gen. jam defunctus fuit ſeiſitus in domin' ſuo ut de feodo & ſic inde ſeiſitus exiſtens poſt quartum diem Febr. An. 27 H. 8. inde feoffavit Edmundum Slifield & al. ad uſum præd. Edwardi Skeat defuncti & præd. Etheldred pro termino vitarum eorum, & eorum alterius diutius viventis, & poſt deceſſum præd. Edwardi Skeat defuncti, & Etheldred tunc ad uſum hæredum de corpore prædicti Edwardi Skeat defuncti procreand' ſuper corpus præd. Etheldred. After a Verdict upon Iſſue nul waſt found for the Plaintiff, Exception was taken to the Writ, becauſe he did not lay the Feoffment to be made to the Feoffors and their Heirs, without which there could be no Inheritance in Ceſtuy que uſe, and by Circumſtance and Conſequence no Diſ-inheriſon, as the Action of Waſte imports, which was agreed to be true. Yet it was judged for the Plaintiff, becauſe the Clerks of the Chancery affirmed and ſhewed their Books, that they had uſed this Form always in that Caſe ſince the making of the Statute. And the Declaration proceeded further in that Caſe, and laid the Seiſin in Fee as it muſt.

1 Cr. 131, 245.

Writs of Waſte wanting Subſtance allowed by reaſon of Practice. Brief general and Court Special.

So note, a new Writ in the Form allowed wanting Subſtance, by the Practice ſince it came in Uſe. though it be late, for the Plaintiff in this Caſe might have had his Writ general, and then there had been no Queſtion of it, for the general Writ ſhould have been maintained with a ſpecial Declaration, as it is common in many Caſes. And the like Preſident with the Principal, was ſhewed by Brownlow 7 E. 6. Ter. Paſch. Rot. 918. inter Gawnium Carew mil. & Thomam Carew, Elizabetham ſa fem in waſt.

Vide for the like upon a Writ of Cui in vita 39 H. 6. 38. Fitz. N. B. 193. M. 8. E. 3. 391.

Tail by what Words.

In this Caſe it was holden clear, that Etheldred the Wife had but an Eſtate for Life, and that the Intail and Inheritance by the Form of Limitation ſuper, reſted only in the Husband Edward Skeat. It is all one, as if it had been hæredibus Edwardi Skeat de corpore ſuo ſuper corpus, &c.

Earl

(113) Earl of Cumberland *againſt* the Counteſs Dowager.

Eſtrepment judicial was awarded out of the Court to the Cozoners of the County of Weſtmoreland in the Action of Waſte, bzought by the Earl of Cumberland againſt the Counteſs Dowager, becauſe the Earl was Sheriff of the ſame Shire, by which Writ the Cozoners were commanded to ſuffer no Waſte to be done in the Lands, &c.

Eſtrepment of divers Forms. 5 Co. 115. b.

Now this Term Oath was made in Court, that the Ladies People had done Waſte after the Wzit publiſhed and made known unto them, yet the Court would not commit them, becauſe it was not a Wzit directed immediately to the Lady and her Servants commanding them to do no Waſte as it might have been, and then it had been immediate Contempt to the Court. But here the Cozoner himſelf is to pzovide againſt the Waſte by taking poſſe comitatus, if there be no Remedy oz the like.

(114) Day *verſus* Savadge. Treſpaſs.

Brownlow. Tr. 12 Jac. Rot. 619. Cuſtom of London to certifie their Cuſtom upon the Mouth of the Recorder. Mo. 871. Jones, 412. 2 Ro. 579, 580.

Matthew Day bzought an Action of Treſpaſs againſt John Savadge foz taking away a Bag of Nutmegs. The Defendant pleaded that the City of London is an Ancient City, and ſo had been Time out of Mind, and that the Mayoz, Citizens, and Commonalty had been all that Time a Cozpozate Body, and ſeiſed of a Bank oz Wharf in London called Queen-Hithe, and by all that Time have uſed to have and take foz Goods laid upon the ſame Wharf, to be conveyed from thence by Water, of Perſons not Lawfully thereof diſcharged Wharfage, that is to ſay, a Half-penny foz every Pozters Burthen there laid to be ſo conveyed, and foz Default of Payment, to diſtreſs ſuch Goods upon the ſaid Wharf, by a Perſon by the Mayoz to be appointed, foz the Collection, and then ſhews, that two Perſons unknown bzought two Pozters Burthens of the Goods of the ſaid Plaintiff, being no Perſon Lawfully diſcharged, whereof the Bag of Nutmegs in Queſtion was Part, and laid them upon the ſaid Wharf to be conveyed by Water. And that the Defendant being appointed Collectoz, &c. demands two Half-Pence, and becauſe they were not paid, diſtrained, &c. as was Lawful foz him to do: The Plaintiff by way of Replication confeſſed all the Bar in general, and ſaid, that within the ſaid City there was, and Time out of Mind had been a Cuſtom, that all the Freemen of the ſaid City, had been, and ought to be diſcharged of the ſaid Payment of Wharfage of their Goods, and averred that he was a Freeman of the ſaid City, &c. The ſaid Defendant ſaid, that there was no ſuch Cuſtom within the ſaid City, & hoc paratus eſt verificare ubi & quando, & prout Curia conſideraverit: And then adds a Surmiſe thus: Super quo præd. Joh. Savadge dicit quod in civitate præd. there is, and Time out of Mind hath been a Cuſtom, that when any Iſſue, &c. upon any Cuſtom of the ſaid City is joined, though the Mayoz, Commonalty, and Citizens be Parties to the Action, the Mayoz and Aldermen of the City have uſed to certifie to the Juſtices the Truth of ſuch Cuſtom; and that the ſaid Cuſtom and all other Cuſtoms of the ſaid City, by Authozity of Parliament in the ſeventh Year of Richard the ſecond was confirmed. And prayed the King's Wzit to the Mayoz and Aldermen of the ſaid City to certifie, &c. And the ſaid Plaintiff ſaith, that the ſaid Iſſue ought to be tried by Jury, and not by Certificate, and that ſuch Cuſtom alledged by the Defendant foz the Tryal by Certificate ut ſupra, is againſt the Law and common Reaſon, and pzayeth Judgment, and that the Cauſe may be tried by Jury, whereupon the Defendant demurreth.

After ſome Arguments at the Bar pro & contra, wherein nothing was queſtioned, but whether the Cuſtom in this ſpecial Caſe were good, that the Mayoz and Aldermen ſhould certifie a Cuſtom which concerned the Intereſt of the Cozpozation whereof they were a Part.

The Court now being agreed determined to give Judgment, and intreated me to pzonounce it foz them all, and ſo we gave Judgment, that this Cuſtom

Custom was not to be tryed by Certificate, but by the Jury, whereof I gave three Reasons.

1 Cr. 517.

1. The first, that it was not properly a Custom, but a Kind of Prescription, or in the Nature of a Prescription, and then clearly it was not within their Custom.

2. Secondly, that it was no such Custom as was within the Reason or Meaning of that special peculiar Form of Tryal by Certificate, that was granted and used in London.

3. Thirdly, it was against Right and Justice, and against natural Equity to allow them their Certificate, wherein they are to try and judge their own Cause.

Custom against Law to try and judge their own Case. Custom and Prescription their Nature and Difference.

As to the first it is apparent, that as Savadge pleads it for the City, it is a meer Prescription in the Corporation, and if he had joined unto it (as he ought to have done) the Point of Discharge of Citizens expresly, as he did generally, under the Name of Person discharged, it had been a meer intire Prescription throughout, and so pleaded.

Now though he omitted that Part, yet when it comes to be shewed on the other Side, if it be true, it appears to be a Branch of the said Prescription, and of the same Nature, and no Custom.

And yet it is true, that being pleaded apart by it self by the Inhabitants as to a Discharge of Free-men, it must be pleaded by way of Custom, and not by way of Prescription, not because of the Nature of the Thing, but because the Freemen cannot Prescribe in their Persons, and therefore are allowed to lay a Custom for their Discharge, so that naturally a Prescription or a Thing Prescriptible is so to be laid, where by Law it may be, and not by way of Custom, and where it cannot be by Law, and therefore is pleaded by way of Custom, the Nature of the Thing is not changed, but remains still a Prescription in his Kind, though it be allowed to be pleaded by way of Custom for Necessities sake. And this Learning appears well in Gateward's Case, Co. lib. 6. 59. b. where it appears, that a Thing lying properly in Prescription, as Common did in that Case being an Interest, which must inhere in some Body, cannot be pleaded by way of Custom, nor cannot stand by Custom where it cannot stand by Priscription, as there they would have made it for Inhabitants, that are not permanent to prescribe, but yet Common for Copyholders in the Lord's Soil is allowed to be pleaded by Custom for Necessities sake, whereas in the Soil of another, it must be laid by Prescription in the Lord, and yet the Nature of both is a Prescription.

1 Inst. 3. b. 2 Cr. 152.

4 Co. 31, 32.

But a Matter of Discharge as the principal Case is, and Discharge of Tithes, as Gateward's Case says, may be laid by way of Custom, for that is not an Interest, but an Exemption, not Positive but Privative of the general Possession. So it is indeed but an Exception out of the Interest, and in Truth should be so pleaded as in the Principal.

To the second Point, this Privilege of London is to be understood of such Customs as are of the Nature of local Laws, peculiar Laws for that City, general to all the Citizens, differing from the general Law of the Kingdom, such as Littleton calls in his Chapter of Burgage, the Customs and Usages in many Boroughs; and samples them that the younger Son shall Inherit, that the Wife shall have the whole Land in Dower, and that their Houses and Lands are devisable, such are the Customs in London, of foreign Attachment, 7 E. 6. Dyer 85. & 3 Eliz. Dyer 196. and the Custom 5 E. 4. fo. 30. that if a Debtor become Fugitive, he may be arrested before the Day of Payment. And Co. 5. lib. fol. 82. Snelling's Case, that if one Citizen be indebted to another in a single Contract, it shall be equal to an Obligation. And 21 E. 4. 16, 74, 75. And 21 E. 3. 46. a good Case to this very Purpose, where in an Assize of fresh Force, in the Court of Oxford, it was pleaded that the Custom of the Town was, that if a Man had Possession of Lands by 40 Weeks, he could not be put out but by the King's Writ, whereupon the other would have taken Issue no such Custom. But it was resolved, that this, being the Law of the City, was not to be tried by Jury, but by the Judges as a Matter of Law, and so indeed in nature of a Demurrer.

Customs in London.

3 Cr. 409. 8 Co. 126. a

Dyer, 247. a. utra.

1 Cro. 517.

And

And the Reaſon thereof is, that the Judges of every Place are ſuppoſed to have Knowledge of the Laws of the Place whereby they do Judge, and to have Cuſtomaries among them. And therefore in Suits in their own Courts do determine them, as the Judges at the Common Law do in the King's Courts judge the general Cuſtoms of the whole Kingdom, being the Common Law. And ſo in London by ſpecial Priviledge they certifie alſo their Cuſtoms of this Nature into the King's Bench, which other Towns do not. But their Cuſtoms, even thoſe that are their local Laws, are triable by Jury, if they come to Iſſue in the King's Courts. And agreeing with this was found, and ſhewed a Precedent Mich. 37. 38 Eliz. Rotulo 418. in the Common Pleas London, between Bilford Plaintiff, and Lowe Defendant, in an Action upon the Caſe for certain Parcels of Plate. And the Iſſue was, whether the Cuſtom of London were, that there was a Common Market in London, for all Goods in all open Shops, all Days, except Sundays and Holy Days, from the Sun-riſing to the Sun-ſet; and concluded, Et hoc parati ſunt verificare, ubi & quando ac prout Curia conſideraverit. And then the Defendants made their Surmiſe for the Trial of their Cuſtom by the Mouth of their Recorder, and prayed a Writ accordingly: And it was granted returnable in Trinity Term, and continued per non miſit bre. 'till Octabis Mich. And then it is entred, that the Concluſions of the Defendants Plea, ought to have been Et de hoc ponit ſe ſuper patriam, whereupon the Plea was ſo made and Iſſue taken, and upon Venire fac. to the Sheriff of London found for the Plaintiff, and had Judgment: Which is a ſtronger Caſe than this at the Bar.

2 Ro. 580.

Cuſtom of London to certifie their Cuſtom by their Recorder. Cr. Car. 517.

Jones 412.

And further in the principal Caſe it cannot properly be ſaid to be a Cuſtom of the whole City, nor for all the Citizens perſonally, as all the Cuſtoms in the nature of Laws are, and as the Form of Surmiſe, for the Trial doth import, for it concerns only the Body Corporate of the City, and the Place Queen-Hithe only where the Profit ariſeth, and where the Diſtreſs is to be taken for it.

As to the third Point, the Books are full, that Challenges are allowed, where the Iſſue concerns a City, or Corporation, and they are to make the Pannel, or where any of their Body be to go on the Jury, or any of him unto them, though the Body Corporate be not directly Party to this Suit, for which Purpoſe ſee 15 E. 4. 18. 28. aſſ. 18. 21 E. 4. 11. where a Dean and Chapter bringing an Aſſize, a Juror was challenged, becauſe he was Brother to one of the Prebendaries.

Co. L. 175.

Now if ſuch Challenges be allowed, where an Attaint lies for a falſe Verdict, much more here where there is no Ways to reverſe a falſe Certificate, and yet it is true that the Certificate is no judicial Act, but Miniſterial. And therefore if the Certificate be Falſe, the Party ſhall have his Remedy by Action of the Caſe, and that not againſt the Recorder, but againſt the Mayor and Aldermen; for it is their Certificate by their Recorder, and ſo is the Pleading and Surmiſe, and the Writ to certifie is a Warrant to them, which takes away one Defence made againſt their Partiality to themſelves, that they did not certifie, but their Recorder. As where a Grant is of a Cognizance of Pleas to be holden before the Steward of the Grantee, licet the Grantee fuerit pars, but there the Steward is Judge himſelf, and not the Grantee, as the King's Judges are between him and the Parties, but here the Recorder is but their Mouth to ſpeak for them, as they Command him.

By that which hath been ſaid it appears, that though in pleading it were confeſſed, that the Cuſtom of Certificate of the Cuſtoms of London is confirmed by Parliament, yet it made no Change in this Caſe, both becauſe it is none of the Cuſtoms intended, and becauſe even an Act of Parliament, made againſt natural Equity, as to make a Man Judge in his own Caſe, is void in it ſelf, for Jura naturæ ſunt immutabilia, and they are leges legum.

Star. cannot eſtabliſh Cuſtom againſt natural Equity. Ap. 139.

Laſtlow

(115) Laſtlow *againſt* Thomlinſon. Aſſumpſit.
Hill. 11 Jac. Rot. 1484.

Jenk. Cent. 287. Checq. cham. Mo. 298. Yel. 5. London. Aſſumpſit. Ro. 1. Ab. 767. 2 Cro. 247, 499, 569.

LAſtlow brought an Aſſumpſit againſt Thomlinſon, declaring that Thomlinſon ſold him ſo many Oats, as according to the Rate of 10 Shillings 9 Pence for every Quarter ſhall amount to 52 Pounds, to be delivered ſuch a Time, which Money the Plaintiff promiſed to pay ſuch a Time. And that the ſaid Oats after ſuch a Rate, came to 96 Quarters, and 6 Buſhels, which the Defendant hath not delivered to his Damage, &c. Upon Iſſue Non Aſſumpſit it was found for the Plaintiff. And upon Judgment a Writ of Error and Error aſſigned, that 96 Quarters, and 6 Buſhels of Oats, after the Rate aforeſaid, came to 52 Pounds and three Farthings, and ſo no Breach, becauſe he was not bound to deliver ſo many. But the Judgment was affirmed, both becauſe it was not certain, whether it amounted to any more, the Account was ſo buſie: And alſo becauſe it was not poſſible in Effect to mince the Meaſure ſo, as it ſhall hit the juſt Sum, as the odd Hours are not accounted in the Year.

The Law regardeth not Things too ſmall. Mo. 298. Yel. 5. Noy. 444. Dy. 55. Pl. 8.

(116) Herrenden *againſt* Margaret Palmer.
Hill. 12 Jac. Rot. 912.

London. Aſſumpſit upon Promiſe. Checq. cham. V. Hill. 1655. Rot. 2521. *Conge* & *Lawes* Caſe, &c. Sty. 472. Jenk. Cent. 296. Mo. 419. Cr. El. 406. Noy. 19. Co. 8. 87. a. Ap. 184. Cr. Jac. 110.

HErrenden brought an Aſſumpſit againſt Margaret Palmer, Adminiſtratrix of her Husband, and declared that her Husband had bought of him Gold, and Silver, and Pearl, and was indebted unto him for them 200 Pounds, and ſhe after his Death had likewiſe bought of him Pearl, for 27 Pounds, and that upon Accompt ſhe was found indebted both thoſe Sums unto him, and promiſed Payment: Judgment for the Plaintiff, and aſſigned for Error, that the Defendant was to be charged by two ſeveral Actions, becauſe ſhe was charged in two Manners, one in her own Right, and the other as adminiſtratrix, and therefore the Judgment was reverſed.

(117) Nichols *and* Raynbred.
Hill. 12 Jac. Rot. 131.

Aſſumpſit. Suff. Jenk. Cent. 296. 4 Co. 94, 17, 38. Ben. 150. Dy. 30. a. Yelv. 134. 4 Leo. 3. 3 Cro. 543. Promiſe for Promiſe. Poſt. 106.

NIchols brought an Aſſumpſit againſt Raynbred, declaring that in Conſideration, that Nichols promiſed to deliver the Defendant to his own Uſe a Cow, the Defendant promiſed to deliver him 50 Shillings: Adjudged for the Plaintiff in both Courts, that the Plaintiff need not to aver the Delivery of the Cow, becauſe it is Promiſe for Promiſe. Note here the Promiſes muſt be at one Inſtant, for elſe they will be both nuda pacta.

(118) Brinſley *and* Partridge.
Trin. 9 Jac. Rot. 318.

Checq. Cham. Aſſumpſit. Derby. Declaration caſting upon a Total. 1 Ro. 396. Yel. 70. Jenk. Cent. 297. Mo. 854. 1 Cr. 116. 2 Cr. 69, 602. Mo. 708, 986. 3 Cr. 581. Hetly, 84. 2 Cr. 596, 69. Cr. Car. 116. Yelv. 70. 1 Cro. 116.

BRinſley brought an Action upon Aſſumpſit againſt Partridge, declaring that he accounted for divers Sums of Money, due to the Plaintiff by the ſaid Defendant, and upon the ſame Account, the Defendant was found in Arrearages to the Plaintiff 7 Pounds, and that the Defendant in Conſideration thereof did promiſe to pay to the Plaintiff the ſaid 7 Pounds, at a certain Day then to come, which he did not pay, to his Damage, &c. The Defendant pleaded non Aſſumpſit, whereupon the Plaintiff had Judgment: The Defendant aſſigned for Error, that the Conſideration was not ſufficient, becauſe the Plaintiff did not ſhew wherefore the Money upon the ſaid Account was due, for Moneys received or lent, or for Wares bought and ſold; notwithſtanding Judgment was affirmed, becauſe by the Accounts the Debt was confeſſed good, and the Promiſe made thereupon good.

(119) Rich *againſt* Shere. Ejectione.
Hill. 5 Jac. C. B. Rot. 1284. Cornub.

RIch brought an Ejectione Firmæ againſt Shere, and declared, that whereas Richard Harris and others 9 Octob. 5 Jac. Regis at S. Gynneys, in the County aforeſaid, did Demiſe, Grant and to Farm let to the Defendant one Meſſuage, four Gardens, 200 Acres of Land, 20 Acres of Meadow, 80 Acres of Paſture, 16 Acres of Wood, and 60 Acres of Heath and Furſe, with the Apurtenances, called Eaſt Ditzard alias Dizard in the ſaid County, to have and to hold, to the ſaid Defendant, for five Years, &c. The Defendant pleads not guilty, whereupon the Plaintiff had Judgment. The Defendant aſſigned for Error, that the Plaintiff in his Declaration, did not ſhew in what Town, Parith, Hamlet, or Place the ſaid Tenement, called the Eaſt Ditzard alias Dizard lay, but in the general County aforeſaid. For that Cauſe the Judgment was reverſed in the Exchequer Chamber this Hillary Term 13 Jac.

Land laid in a County without a Town. 2 Le. 21. Ant. 82. Jenk. Cent. 297. 2 Ro. 396.

Hob. 337. Yelv. 207. 2 Ro. 617. 2 Cro. 282. Plo. 191. a

Note, here is a Trial without a Viſne, if the Jury were from Saint Gynneys, and if it were de Corpore Com. it was not good, for that is not to be allowed, where a nearer Place may be, but for Titles, as Knight or not, or the like, which are large.

Viſne. Want of it in the Declaration hurts not where the Matter is confeſſed by the Defendant. Ante. 82.

(120) Foxcroft *verſus* Lacy.
Trin. 11 Jac. Rot. 1099. Ebor.
Caſe.

FOxcroft brought an Action of the Caſe againſt Lacy and declared, that whereas Lacy, and four others had a Suit in the Star-Chamber againſt the Plaintiff and Sixteen others concerning Conſpiracies, &c. and that Communication was moved between John Walter and Rice Gwyn Eſquires, concerning the ſaid Suit, that the Defendant Lacy upon the ſaid Communication, in their Preſence, ſpake theſe Words: Theſe Defendants, Innuendo the Plaintiff and the other Sixteen Defendants are thoſe, that helped to murther Henry Farrer, meaning one Henry deceaſed, who was murthered by one Thomas Oldfield, who was hanged for it, to the Plaintiff's Damage, &c. The Defendant denyeth the Words, and found for the Plaintiff, and Judgment given; Error was aſſigned generally, that the Judgment ſhould have been contrary, but Judgment was affirmed, for it was holden, that it was ſufficiently laid to entitle every one of the Defendants to a ſeveral Action, as if they had been ſpecially named.

Action for Slander to many not named, but ſignified. Checq. Cham. Jenk. Cent. 297. 1 Roll. 75. 2 Cr. 635. Poſt. 252. Ant. 6.

Latch. 262. Styl. 244, 350. Dy. 19. Styl. 156. Cr. Jac. 647.

(121) Bayle *verſus* Gird. Aſſumpſit.
Trin. 12 Jac. Rot. 1599. Checq. Cham.

BAyle brought an Aſſumpſit againſt Gird, declaring, that in Conſideration he ſhould die divers Clothes, called Devonſhire Kerſies, into ſeveral Colours, naming ſo many ſeverally as amounted in the whole to be 60. That the Defendant did promiſe to pay him a certain Sum, for the dying of every ſeveral Cloth, and avers, that he did accordingly die the ſaid Clothes amounting in all to 59. Whereas indeed they were 60 ut ſupra. And that the Money came to 19 Pounds, which he had not paid. Found and adjudged for the Plaintiff; and Error aſſigned, in that it appears he ſhould have dyed 60, and dyed but 59. And ſo the Sum aforeſaid not due. Alſo the Jury did aſſeſs Damages occaſione detentionis debiti præd. Whereas it ſhould have been occaſione non performationis Aſſumptionis, &c. But the Judgment was affirmed, for that it was firſt averred he died all, which appeared before to be 60. So the other was but a Miſ-ſumming, and as to the other it was a Debt, and a Promiſe implyed upon it.

Devon. Miſ-ſumming hurts not. Jenk. Cent. 297. 2 Cr. 247, 569. Yel. 5 Mo. 298. Dy. 55. b. 2 Cr. 499. Latch. 175. Pop. 209. Aſſumpſit for dying Clothes.

Ant. 42.

Checq. Cham. London.

(122) Keere *verſus* Owen. Error. Mich. 5 Jac. Rot. 79.

Error. Elegit. Error in Execution. Jenk. Cent. 298.

KEere **recovered** 400 **Pounds Debt, againſt** Edward Owen **who died, and upon** a Scire fac' **into the County of** Surrey **the Sheriff returned** Rebecca terretenant omnium terrar' & tenementorum in balliva ſua quæ fuerunt præd' Edwardi, &c. **And Judgment given, that** Keere **ſhould have Judgment and Execution againſt the ſaid** Rebecca; **whereupon the ſaid** Keere **prayed the** Elegit **thus entred in the Roll.** Elegit ſibi liberari medietatem omnium terrarum & tenementorum in Com' Surrey tenend', &c. quouſque, **and left out,** Quæ fuerunt prædicti Edwardi, &c. **And for this Judgment was reverſed** quoad adjudicationem executionis, **upon the** Elegit, **and yet the Writ of** Elegit **it ſelf, and the Return of it, were well in that Point. But where the Roll is faulty the Writ will not help.**

Dy. 208. P. 5.

Poſt. 246.

It was alſo aſſigned for Error, that ſhe was returned Terretenant omnium terrarum, **without aſſigning of what in certain, that was not allowed for Error.**

Mandamus.

(123) Spathurſt's Caſe. H. 13 Jac.

The Checq. Cham. Error. *Ut de uno groſſo.* Jenk. Cent. 298.

After the Death of John Spathurſt, **by** Mandamus **in** Suſſex, **it was found that he died ſeiſed of certain Lands,** Et quod tenentur de domino Rege ut de uno groſſo per vigeſimam partem unius feodi mil. **This was ruled by the Chief Baron and my ſelf, my Lord Chief Juſtice being abſent, that it was a Tenure by Knight's Service in chief. All Tenures in chief are in groſs, and the Word** ut de groſſo **are ſcarce of any Senſe, but of no certain Senſe at all in Law, and ſo ſtand as void.**

Commiſſion.

(124) *Sir* Thomas Puckering's Caſe. H. 13 Jac.

Jenk. Cent. 298. Ante 46. 2 Roll. 39. 2 Cro. 388, 389.

IT was found by Office taken at Barnat **in the County of** Hertford, 18 Maii, 38 Eliz **by Commiſſion, in the nature of a** Diem Clauſit extremum, **that Sir** John Puckering **Knight, late Lord Keeper of the great Seal of** England, **and the Lady** Jane **his Wife, were jointly ſeiſed to them, and the Heirs of him, of the Manor of** Weſton, **in the County of** Hertford, **and of the Manor of** Kingerby **in the County of** Lincoln, **by the original Purchaſe of the ſaid Lord Keeper, and that they being ſo ſeiſed thereof, and that the ſaid Sir** John Puckering **being alſo ſeiſed in Fee of the Manor of** Weſton Argentine, **in the County of** Hertford, **and of the Manor of** Kington **in the County of** Warwick, **he** ultimo April. 38 Eliz. **died ſo ſeiſed, and that the Lady** Puckering **him ſurvived, and that the Manor of** Weſton **only was held of the late Queen in** Capite **by Knight's Service. And that the reſt of the ſaid Manor were held in Soccage, and not of the Queen in** Capite **or Knight's Service, and that Sir** Thomas Puckering **was his Son and Heir, of the Age of four Years** 3 Decem. **before the Death of his ſaid Father.**

Ward made Knight

The ſaid Lady Puckering 17 Maii 9 Jac. **died,** Thomas **the Heir,** 3 Junii 10 Jac. **was made Knight.** 3 Decemb. 10 Jac. **he accompliſhed his true full Age, and tendred his Livery, and within the Time limited he ſued forth a ſpecial Livery, under the great Seal of** England, **no Office being then or yet found of the Death of the ſaid Lady, nor any Charge they impoſed upon the Heir of the ſaid Lands.**

Livery ſpecial what it diſchargeth.

In the ſaid ſpecial Livery, there is contained a Releaſe and Pardon from his Majeſty to the the Heir, of all Entries and Intruſions made by the Heir into any of the Manors and Lands whereof his Father died ſeiſed, and alſo a Pardon and Releaſe of Accounts, and of Actions, Suits, Quarrels, Impeachments, Executions, and Demands whatſoever, which his Majeſty, at the Time of the ſuing forth of the ſaid Livery by any Means had or might have againſt the Heir, not extending to diſcharge him, or his Lands of any Debt, Account or Demand, by reaſon of any Office, or Receipt of any of his Majeſty's Moneys or Treaſure, or of the Converſion of

of the ſame, or of any Debt then due, by Recognizance or Obligation. The Auditors, ſince the ſpecial Livery aforeſaid ſued, have impoſed ſeveral Charges upon the Heir, one for mean Rates due, as is ſuppoſed between the Death of the ſaid Lady, and the true full Age of the Heir. And the ſecond Charge not of a Sum in Particular, but to bring the Heir ad Computandum pro meliore valore, and upon a Demurrer to this laſt Charge, for the Incertainty and Inſufficiency thereof, and a Plea to the former Charge this laſt Caſe appeareth, wherein theſe Queſtions are.

Whether the laſt Charge be Lawfully impoſed upon the Heir or no, in regard the Charge is general, ad computandum pro majore valore. And it is not grounded upon the ſaid Office, nor warranted by any Precedent, or by the Courſe of the Court. 1.

Whether the King be, or can be entitled to any mean Rates, between the Death of the ſaid Lady Puckering, and the Knighthood of the ſaid Sir Thomas Puckering, or between his Knighthood, and between his true full Age, no Office being found of the Death of the ſaid Lady Puckering, nor any Charge impoſed, before the ſaid Knighthood, or the ſaid ſpecial Livery ſued. 2.

Whereupon we reſolved, that the Auditor can ſet no Charge, nor award Proceſs, to anſwer any Charge but upon a Record, as an Office, or the like. Courſe of the Court of Wards.

But yet if an Office be found only in one Shire of all the Lands, lying as well in other Shires as there, which in Law is no Office, but for the proper Shire, yet this by the Courſe of the Court is allowed as an Office to all to Ground a Charge and Proceſs upon; and this is Beneficial to the Subject, who elſe by divers Offices would be put to an intollerable Charge.

Again, where in this Caſe there was an Office, after the Death of Sir John Puckering, of the Manor of Weſton, in the proper County of Hertford, whereby the Eſtate hereof was found; out of which it did appear, that no Wardſhip of the Land could accrue during the Life of the Lady, becauſe it was but a Remainder to the Heir, ſo that an Office ought to be found of her Death: Yet becauſe the Original Cauſe of the Wardſhip is the Remainder demanded, and the Death of the Lady is but a Removal of the Impediment of the Wardſhip; it is therefore allowed by the Courſe of the Court, and in Caſe of the Subject, that the Certificate of the Feodary of the Death of the Lady, made into the Court without Office, ſhall be ſufficient to put it in Charge. Office findeth Deſcent of Rem. there needs no new Office upon the Death of the Tenant for Life.

So here it was reſolved, that if the Feodaries Certificate of the Death of the Lady were in Court, before the ſpecial Livery granted, that the mean Rates incurred from the Death of the ſaid Lady, 'till the Knighting of Sir Thomas Puckering, were not diſcharged by the Courſe of the Court, becauſe they were by that Courſe of the Court adjudged in the King, veſted upon Certificate as well as if it had been upon Office; but thoſe that were incurred ſince his Knight-hood (being then made of full Age in Law) 'till his full Age indeed were perfectly diſcharged by the ſpecial Livery, or rather indeed by the Knighting of him, and Tender of his Livery, which he might tender as ſoon as he is knighted, being then made as to all Caſes of Wardſhip of his full Age, for the Wardſhip of the Body continues not, as if he were ſtill under Age, but the Value of his Marriage he muſt anſwer becauſe it was fully veſted in the King by his Nonage before. Ant. 46. 2 Ro. 39. 2 Cr. 389. 6 Co. 74. a. 8 Co. 173. a.

Paſch. 14 Jac. Star-chamber.

(125) The Lord William Howard *againſt* Chriſto. Bell, Tho. Salkeld, John Dacre, *and* others.

IN the Star-chamber, in a Cauſe between the Lord William Howard Plaintiff, and Chriſtopher Bell, Thomas Salkeld, John Dacre, and the other Defendants, it was holden by my Lord Coke, and my ſelf, that the Tenants of the Manor of Gilſeland claiming Tenant-right, and being now impeached by the Plaintiff, being Lord of the Manor, who ſuppoſeth their Eſtates to be void in Law, that they might all join together in a quiet and peacea- Mo. 562, 788.

ble Manner, to defend the Cauſe, being Common to them all; and therefore though ſome particular Perſons were ſued, yet they might defend their Suit upon their common Charge. And the Reaſon was, that ſince the Title was one againſt all, it was in Effect but one's Defence, and one Defendant, for the Trial in one Man's Caſe tried all. And therefore the Courts of Juſtice do every Day deny them to be Witneſſes one for another in ſuch general Caſes, as in Caſes of common Modus Decimandi, and the like, wherein alſo it is many times ordered for avoiding of unneceſſary Multiplicity of Suits, that a Trial may be had in one Man's Caſe for all. Now as they are acknowledged Parties to their Prejudice in Defence, ſo it is in Reaſon that they be in like Manner allowed for their Advantage. And ſo it was ſaid, that it had been ruled in that Court before in the Caſe of the L. Grey of Groby. Yet the Lord Chancellor ſeemed to be of a contrary Mind, and cited a Precedent in 8 El. to that Purpoſe. But yet in this Caſe it was agreed, that they muſt not join themſelves together by Oath, which was in this Caſe ſuſpected, but not ſufficiently proved. But Bell being a Tenant was fined 100 Pounds for aſſembling the Tenants to the Number of 200 in an open Field, where Leonard Dacres had been in open Rebellion, and fought a Battel with the Queens Forces, divers of the ſaid Tenants being weaponed with Swords and Daggers, abiding three Hours together, and yet nothing was proved done there by any of the Defendants, but Conference concerning the Defence of their Title by Promiſe and Writing, and Contribution of Money to that Purpoſe. And Hodſon another Tenant was alſo puniſhed for being Preſent at that Aſſembly, and the Event of ſuch Aſſembly is in no Man's Power to moderate. And Salkeld and Dacres were fined a 100 Pounds a Man, becauſe that being no Tenants, nor any ways intereſſed in the Cauſe or Title, and being Men of Strength and Countenante, they did thruſt themſelves by way of Maintenance into it, warranting the Title, ſtirring the People to perſiſt in it to give Occaſion of Suits at the leaſt, where perhaps elſe the Cauſe had been ended by way of Agreement, with all, as it hath done with many. But Salkeld and Dacres were not of the Aſſembly, neither did it certainly appear that they were acquainted with all. And Mich. 14 Jac. Barkſhire in a Caſe between Edmund Dunch Eſquire Plaintiff, and Banneſter and other Defendants, where the Queſtion was between the Plaintiffs and the Defendants Tenants of the Lord Norris of Dorcheſter Manor for a Common in Effect claimed, which he denied though the Action were between him and one of them only, upon a particular Cuſtom laid for his Tenement only for Neceſſity of Pleading. It was reſolved by the moſt Part, that they might all maintain with their Purſe. But becauſe Banneſter though he were a Tenant had threatned ſome, that they ſhould loſe their Copyhold for not contributing to the Lord Norris, he was fined at Forty Pounds, and the two reſt quitted. But the Lord Chancellor differed.

Buls. 1. R. 202. Syder. 1. R 51.

Aſſemblies Unlawful.

Noy, 99.

Maintenance of a common Cauſe by common Perſons.

(126) Gold *verſus* Death. Obligation.

HUgh Gold brought an Action of Debt upon an Obligation againſt Henry Death, Executor of John Death, and the Condition was, that where Gold had taken Anthony Death as an Apprentice, that if he the ſaid Anthony ſhould Waſte or Conſume any of his Goods, and that duly proved by the Confeſſion of the ſaid Anthony, or otherwiſe, that then John Death and his Executors within three Months next after ſuch due Proof and Notice thereof given unto him or them, ſhould render him Recompence and Satisfaction. The Defendant pleads, that there was no Proof made, &c. The Plaintiff replies, there came to the Hands of his Apprentice in Flemiſh Money to the Value of 3000 Pounds of his, whereof the Apprentice imbeziled and waſted as much as came to 400 Pounds, and that he confeſſed it, and by a Writing under his Hand did acknowledge and confeſs it. And that he gave Notice of it to the ſaid Henry Death, and he did not make him Recompence within three Months, whereupon the Defendant demurred: And it was adjudged for the Plaintiff in the King's Bench. And now upon a Writ of Error in the Exchequer Chamber the Judgment was agreed to be confirmed;

Checq. Cham. Action of Debt upon an Obligation. 1 Brnl. 33. Winch. Ent. 168, 169. Jenk. Cent. 300. 1 Ro. 222, 261. Condition, Br. 151. 2 Cro. 381. Moo. 845, 888. 2 Roll. 595. 3 Bulſt. 55. 1 Roll. Rep. 222, 261. Buls. 1. R. 40.

Parol [Proof] how to be taken. 2 Ro. 434. p. 12. Poſt. 217.

confirmed; for though the Word [Proof] but generally ſhall be underſtood by Law ſuch a Proof as is Legal, ſcil. Proof by Jury, yet when the Party expreſſeth himſelf to mean and allow another Form of Proof, that ſhall Prevail againſt that that is but by Conſtruction of Law. And here it is referred to the Confeſſion of the Party, which ſhall be underſtood a Confeſſion Voluntary according to the common Acceptation, and not a Confeſſion in the Court of Record. Alſo, though it be not ſaid to whom he made the Confeſſion in Replication, yet by the greater Opinion it was holden good enough, becauſe it anſwered the Words of the Condition. And it is not like Halfpenies Caſe of Agreement or Diſagreement to an Intereſt, which muſt be made to the Party intereſſed.

2 Roll. 594. 8 Co. 20. a. Syd. 313. 1 Co. 76. b. Mo. 113, 253, 322. Ben. 139. Perk. 791.

Yet afterwards it was found and moved by Heneage Finch of Counſel with the Plaintiff, that the Notice was laid to be given to Henry Death, which was the Executor. And it did no where appear that John Death the Teſtator was dead at the time of the Notice, which was a neceſſary Part of the Condition. And therefore the Judgment was reverſed.

1 Cr. 382.

2 Cr. 381, 488.

(127) Moore *verſus* Huſſey, & al. Raviſhment.
Tr. 7 Jac. Rot. 759.

FRancis Moore Plaintiff againſt James Huſſey Doctor of Law, and Katharine his Wife, Robert Wakeman and John Woodford, and Cutbert Clifford Defendants, and counts that where Ralph Horniold held of the late Queen in Chief, and died in the Thirtieth Year of the Queen, leaving John Horniold his Son and Heir of two Years of Age, and that the Queen Anno 35 Regni ſui did grant the Wardſhip to the Plaintiff.

Buck. Waller. The Raviſhment of a Ward Cl. 9. fol. 71. Raviſhment of Ward againſt a Feme Covert. 2 Brnl. 59. 2 Cro. 413. m. 1 Roll. Rep. 445. m. 9 Co. 71. b. Buls. 3d. R. 275. Rolls. Ab. f. 792.

The Defendants An. 5 Jac. did raviſh and take away the ſaid Ward to his Damage of 2000 Pounds. The Defendants plead not Guilty, and are all found guilty ſaving James Huſſey, and Cutbert Clifford, Damages Ten Pounds and Ten Shillings Coſts. And the Jury farther find, that the Ward is married, and was at the Time of the Marriage 16 Years Old and more, and under 21, and that his Marriage was worth eight Hundred Pounds.

Now this Term (ſcil. Paſch. 14 Jac) this Caſe was argued by all the Judges of the Common Pleas, after divers Arguments at the Bar, and the Queſtions were made two.

First, Whether the Wife of Doctor Huſſey being a Woman Covert and found Guilty, and her Husband not Guilty, be within the Statute of Weſtm. 2. cap. 35. or not, and her Husband to pay the Value and Damages for her.

Secondly, Whether the Verdict finding that the Ward was married (without certainly by whom) be ſufficient to charge the Defendants or any of them with the Value of the Marriage.

But (as I ſaid) the Queſtion in groſs is but one, Whether the Statute ſhall be made in the whole eluſory or not? For to leave all Women covert at Large, who are both moſt Cunning and Vigilant, and have moſt Opportunity to make theſe Matches for their Daughters or Friends, and next to put the Guardian after Raviſhment to hunt out who married the Ward, or elſe to fail of his Value, is utterly to fruſtrate the Law.

Now to the firſt Point, the Woman is plainly within the Words, but there are two Exceptions to exempt her in Meaning. First, becauſe ſhe is a Woman Covert, the other becauſe the Statute inflicts Abjuration or Perpetual Impriſonment, in caſe the Raviſher cannot ſatisfie for the Marriage. But here it is ſaid, that the Woman is under a neceſſary Diſability in Law to ſatisfie, and therefore as being out of the Meaning ſhall not be puniſhed (for not ſatisfying) with Impriſonment or Abjuration.

First great Point divided into two. 9 Co. 73. a.

Now to the firſt Part it is confeſſed, that a Woman Covert was at the Common Law ſubject to an Action of Treſpaſs for taking away a Ward, as ſhe was for any other Action of Treſpaſs, and to be impriſoned for the King's Fine, and her Husband anſwerable with her for the Damage.

First Branch of the firſt great Point. 11 Co. 61. b.

And

43 E. 3. 23. Action of Treſpaſs againſt the Husband and Wife, for the Wife of another taken away with the Goods of the Huſband. Impriſonment, Br. 114.

And he that obſerves well this Statute ſhall eaſily perceive, that it hath two Aſpects, one Civil, another Criminal. For it provides that the Executor ſhall anſwer for the Value, ſed non quoad pœnam priſonæ, quia quis pro alieno facto non eſt puniendus, which holds alſo for the Husband and Wife, that he ſhall anſwer the Damages, not the Puniſhment of immediate Impriſonment, but the mediate Impriſonment that is upon a Writ of Execution, for the Damages and Value he ſhall, as in other Treſpaſſes: For if they made the Executor (which is but in civil Repreſentation the ſame Perſon) Anſwerable, much more the Husband, which is one by Law of Nature.

Now the Action at the Common Law was in Effect and Subſtance the ſame that is now, only it hath received ſome Additions, and ſome more diſtinct Form of Proceeding than was before.

9 Co. 72. b.

The Writ at the Common Law was, Quare filium & hær. (cujus maritagium ad ipſum pertinebat, and ſometime without that Clauſe) vi & armis rapuerunt abduxerunt & maritaverunt, without ſaying within Age; and yet judged good, for it is a Guard Natural, not Legal, 32 E. 3. Fitz. gard. 32. and Fitz. N. br. 91. and 143. and Regiſt. 98, 99. And the like for the Guardian at Common Law by the Word of rapuit & abduxit, as appears 29 E. 3. 37. and 29 Aſſ. 35. By which Books and 12 H. 4. 16. It is agreed that both the Father and Guardian ſhall recover in Damage for the Value of Marriage.

The Offence therefore and the Fact is the ſame in the very Word rapuit in the Statute that was at the Common Law, and the Reſtitution the ſame in Effect by the diſtinct Valuation of the Marriage that was before given confuſedly in the Damage.

Bar. Br. 112. 2 Ro. 354. p. 34.

The Matter is ſo far the ſame, that if a Man recover in the Treſpaſs at the Common Law, it ſhall bar him in a Writ of Raviſhment & e contra; as in the Treſpaſs of Battery and Appeal of Maihem, and in common Treſpaſs, and the Treſpaſs upon the Statute of 5 R. 2. or 8 H. 6. or malefactoribus in parcis.

Again, the Writ upon this Statute hath not eſtranged the Writ at Common Law, but participates. And therefore 17 E. 73. and 22 Rich. 2. Damage 130. it was excepted that no Damage ought to be given in a Writ of Raviſhment, becauſe the Statute gives none but that only the Body and Value of Marriage. It is anſwered and reſolved by the Court, that it was uſual, and the Damage was by the Common Law, and the Marriage by the Statute, and Reaſon it was to join them ſo.

And it was further ſaid, that it was not the like Reaſon between the Formedon and Deſcender, and Mordanceſter, becauſe both theſe are in the Nature of Treſpaſs.

At the Common Law a Man ought to recover for the Marriage, though he were not married, for the Loſs and Hazard apparent. Alſo where a Man doth arreſt his Debtor, and where he might have good Bail, the Sheriff lets him Eſcape being Non-ſolvent, and not to be had again, the Jury are to give Damage for the whole Debt in Effect; for though the Debt remain in Law, yet it is loſt in Effect, and the Guardian at the Common Law could not have a new Treſpaſs without a new Taking, and he could not have a Conditional Verdict for Marriage after happening, as this Statute hath provided. And therefore now the Damages are diſtinguiſh'd ut in ſectis laboribus dilationibus & expenſis, as the Precedents go ultra valorem, which was confuſed to all before at Common Law.

The Offence of Raviſhment then being not ſufficiently provided for, and reſtrained by Common Law, as was perceived, Statutes were made for other Puniſhment of this plagiary Offence or Injury, being much greater than the Wrong in other Creatures, in as much as the Body of Man is more Honourable and of greater Price, and was in ancient Times uſed by the Lords, as now it is by the King's Committees for Advancement of their own Children by way of Marriage, or otherwiſe.

* Note, the ſame Exception may be taken for a Woman Covert to exempt her out of this Statute, that is taken for the other.

* Thereupon in the Statute of Merton, c. 6. it was provided for Wards under 14. contra pacem vi abductis vel detentis ſeu Maritatis, quicunque laicus inde convictus fuerit qui puerum aliquem ſic detinuerit, abduxerit vel maritaverit,

reddat

reddas perdenti valorem Maritagii, & pro delicto corpus ejus capiatur ut imprisonetur donec perdenti emendaverit delictum si super maritetur. Here it is, si puerum maritaverit, which Expounds the other Statute. And then W. 1. Cap. 22. Confirms this Statute in general.

This Statute was not found full enough to give Remedy, and therefore the Statute in Question was made, which might well be said to be made by Men unlearned, for indeed it was the Interest and Heat of Lords for the general Abuse that begat it, for the Act being in his Nature a Trespass and Act of Force, yet is not made vi & armis. And therefore 7 H. 4. 9. the Count vi & armis was rejected.

Next, the Nature of Trespass being to end in Damage, this recovers the Body it self, and yet not by Demand, but by Commandment to the Sheriff to take and sequester the Body, and then by Judgment giving it to the Plaintiff, if it be for him.

Again, where all Trespasses die with the Person, here the Action is continued with the Heir or Executor, against the Heir or Executor, and though the Heir die, in case of Ward as well as Ravishment.

And therefore 24 E. 3. fo. 29. upon a Re-summons in such a Case against the Executor, he pleaded Pleniament administer, whereupon Issue, and yet the Ward judged to the Plaintiff, and 9 E. 3. 15. Guard of Body and Land against three, whereof one died during the Proclamations and Re-summons against his Heir, and though he were within Age, yet Judgment passed presently against all, for it was said that this was the first Action, but it was doubted whether the Heir should answer Damage.

11 H. 4. 55. If the Ancestor have his Ward ravished, and bring his Action and die, the Heir shall have the Re-summons, but not the Executor. But if the Ancestor brought not the Action, the Executor shall commence it, not the Heir, for it is a Case out of the Statute. And in this Case Hill says that the Makers of the Law were not learned; which the Reporter reproves. 2 Inst. 450.

This Progress of Statutes argues the Care of Redress, and that there was no Purpose by increasing the Pains and providing certainly for Remedy in case of Death of either Side, to exempt any former Offenders. And therefore it hath been still extended by Equity. Therefore it is given to Guardian in Soccage, as the Books 1 E. 3. 20. tempore E. 1. ff. gard. 133. Register 163. by Equity of the Statute of Consimili casu. And Fitz. Nat. br. 139. is recto de custodia lay for them both at Common Law. 2 Cr. 99.

And that is yet stronger both 23 E. 3. fo. 31. Gard. and Fitz. N. Br. 142. G. That the Committee of an Orphan, by the Mayor and Aldermen of London, declaring upon their Custom shall have the Writ and the Age, and Nonage shall be limited by them. Age of Orphan Arbitrary.

And 47 E. 3. F. Gard. 30. the King shall maintain that Action. This new Remedy was given in case of Ravishment in odium spoliatoris.

Upon the Trespass upon the Statute of malefactoribus in Parcis, it is confessed the Wife is punishable, so in Trespass upon the Statutes of 5 R. 2. and 8 H. 6. 9 Co. 72. a.

Of these, the Reason is not because the Form of the Actions, and the Judgments and Executions are the same, but because the Ground and Substance of the Action is one, and the Aggravation of Offence and Punishment, is an Argument that they never meant to exempt any Offender, that was known in Law before. Coverture was not at Common Law so far protected as was Infancy and some other Disabilities (*scilicet*) *Non sanæ memoriæ, Ouster le mere, & imprisonment. Lechford's* Case. Cl. 8. 29. For a Woman Covert hath no less Judgment than discovers. 2 Inst. 414.

And in stronger Cases, Women Covert are involved amongst others, where a new Offence is created, that was not before. And therefore where the Statute of 34 E. 1. that if in an Assise the Tenant plead Join-tenancy with a Stranger, who being called in maintains it, and it be found False, he shall be imprisoned a Year, and not to be delivered without a great Ransome. In 21 Ass. p. 28. an Assise was brought against her Husband, who pleaded Jointenancy with his Wife by Deed, and she being called in maintained it, which being found False, she was adjudged to Prison according to that Law. Yet 36 E. 3. Fitz. Ass. 443. And Saunders in Ployden 364. and Hawes 4 H. 7. 11. agree upon the Statute of Westm. 2. cap. 21. That if an Infant fall in Assise of a Record by him pleaded, he shall not be thereupon

upon judged a Diſſeiſor upon that Law. And where the Statute of Mert. cap. 3. gives a Writ of Rediſſeiſin againſt one that, being convicted of Diſſeiſin, doth again Diſſeiſe the ſame Perſon, that thereupon he ſhall be taken and impriſoned, till he be delivered by the King by Ranſom or otherwiſe.

Co. L. 154. b. 9 H. 4. 5. If a Woman commit a Diſſeiſin and be convicted, and then commits a Rediſſeiſin, and then Marries, ſhe ſhall be charged in Rediſſeiſin and her Husband named with her for Conformity; but he muſt not be charged as a principal Actor in the Wrong done, no more than for a Treſpaſs done by his Wife before he married her, yet he ſhall ſatisfie the Damages.

9 Co. 73. a. Now where it is in the ſecond Place objected, that the Womans Diſability to pay for the Marriage ſhall excuſe her of the Impriſonment and exempt her out of the Meaning of the Law, under that Rule, Lex non cogit impoſſibilia, ſed impotentia excuſat legem.

I Anſwer: That firſt, that Point anſwers but one Branch of the Law, which is, ſi hæredem non reſtituerit vel poſt annos nubiles maritaverit, abjuret regnum vel habeat perpetuam Priſonam. But the Clauſe before that is, Si ille qui rapuit poſtmodum reſtituerit puerum non maritatum, vel de maritagio ſatisfecerit, puniatur tamen de tranſgreſſione per Priſonam duorum annorum. And then follows the other Clauſe; ſo the ſame Perſons are underſtood in both Caſes.

Now in the firſt Clauſe, the Impriſonment ſtands abſolute, and hath no ſatisfaction required, to which a Wife is unable, no more than the Statute of Merton, within which ſhe is confeſſed to be. And therefore ſhe may be contained in that, and then in the other alſo. And the Text before cited I allow; but it hath no uſe for this Caſe, for it is to be underſtood Impotency to excuſe the Law, where the Impotency is a neceſſary or invincible Diſability to perform the Mandatory Part of the Law, or to forbear the Prohibitory.

Now this Law and the Scope of it is abſolutely and directly to forbid the Raviſhment of a Ward, and the Reſtitution of the Value is but a Proviſion by way of Condition, if the Law be broken. But all Laws, which be artificial Creatures, do as well as natural Creatures affect their own Converſation; and therefore do deſire and command that they be not violated, not that their Wrong be redeemed, for as it is ſaid, that pœnitentia is but Tabula poſt naufragium, ſo it may be ſaid of Redemptio. Now then who will ſay, that the Woman is unable to obey the Law, ſhe is unable to redeem more than any Beggar, and therefore ſhe ought to be more Careful not to offend the Law, which is in her own Power; and the Penning of the Law is as proper as it is Poſſible, for it is not de Maritagio non ſatisfecerit, as the common Form of Penning in ſuch Caſes is; but ſatisfacere non potuerit, which is the Caſe in Queſtion. And therefore where Perſons Able have a Choice, when they Offend to pay or ſuffer, ſhe knowing ſhe hath no Means to pay did by offending voluntarily (as it were) yield her ſelf to Abjuration or Impriſonment.

It is true, that all Laws admit certain Caſes of juſt Excuſe, when they are offended in Letter, and where the Offender is under Neceſſity, either of Compulſion or Inconvenience, or elſe where he is in Ignorance invincible; or where the Offence is by a meer Miſfortune, without Will or Purpoſe. Or where there is a meer Impotency to that that it is required.

By Compulſion. As in the Caſe of Lucretia with young Tarquin, of whom S. Auſtine ſays, Duo fuerunt, & unus commiſit Adulterium, and thereupon he makes the Dilemma: ſi caſta, quare trucidata? ſin minus, quare laudata?

8 Co. 91. b. 5 Cr. 544. Plow. 18. b. Neceſſity of avoiding greater Inconvenience, as where one kills a Thief or a Burglar in Defence of his Perſon or Houſe, 22 aſſ. 56. the binding and beating of a Perſon Lunatick, removing of a Perſon Leprous.

In Ignorance, as in the Caſe of Jacob and Leah.

Such is the Excuſe of a Deed read amiſs to him that cannot read, or reported to him that is Blind.

Lunacy in him that kills a Man.

Of Impotency, as in the Caſe of Mephiboſheth, accuſed by Ziba his Servant to David, and by himſelf excuſed by his Impotency, a foul Action,

and an unjuſt Judgment of David towards him, Feſtinatio juſtitiæ noverca.

In all which Caſes, there is a juſt Excuſe of the Law not perform'd. By theſe the Diſtinction from the principal Caſe appears clear, but the Principal falls upon the Rule, Qui non habet in ære, luat in corpore, ne quid peccetur impune.

Upon the Statute of Weſtm. 1. cap. 13. whereby it is enacted, That if a Man ravish a Woman, he ſhall be puniſhed with two Years Impriſonment, and fined at the King's Will. And if he have not whereof to be fined, to be puniſhed by longer Impriſonment. Will any Man doubt if a Monk, which hath no Subſtance commit a Rape, but that he ſhall nevertheleſs ſuffer Impriſonment?

So upon the Statute of Weſtm. 1. Cap. 20. de Malefactoribus in parcis, it is enacted, that if any be attainted at the Suit of the Party, he ſhall be fined, if he have whereof; if not, he ſhall be impriſoned and find Surety no more to offend.

The Statute 5. Eliz. If any Perſon Forge, &c. he ſhall pay double Coſts and Damages to the Party grieved and ſuffer the Corporal Puniſhments; ſhall none be puniſhed, except he can do both? Indeed the Husband ſhall not upon Indictment of his Wife, for that is meerly in a Criminal Courſe, and the Husband not Party to it, as he is to ſome Actions. Breife Br. 345, 349. 11 Co. 61. b. Cr. Car. 407, 513.

5 Eliz. If any Perſon be convicted of Perjury he ſhall Forfeit 40 Pounds, and if he have not Goods and Chattels, or Lands to the Value, then to be impriſoned by a Year. If the Penning had been Vice verſa, the Perſon ſhall be impriſoned, except he pay 40 Pounds, or ſuch as are able ſhall pay Money, ſuch as are not able ſhall be impriſoned; could there have been any Doubt? And this is as much. It had been Colour if it had been thus: Such as will not Pay. For the Fault here is in her Power, as the Statute ſpeaks purpoſely, not in her Will.

19 Aſſ. 6. The Wife impriſoned for Force, 9 H. 4. 6.

And upon the Statute 1 Eliz. againſt hearing of Maſſes, 2 Eliz. Dyer 203. The Judgment and Statute is, that the Offender ſhall forfeit an Hundred Marks, and if he pay it not within ſix Months, then to be impriſoned: It was never doubted, but to extend to Women Covert: So it is in that Book.

And 1 El. c. 2. Every Perſon failing to go to Church was enacted to forfeit 12 d. a Sunday to be levied by the Church-wardens, for the Relief of the Poor, of the Goods, Lands and Tenements of ſuch Offenders by Diſtreſs. This extended to Women Covert. 11 Co. 61. b.

Then 23 Eliz. the 20 Pounds a Month was given for this, and if they were not able, or failed to pay, then to be impriſoned 'till they paid. The Woman Covert is within the Statute. Foſter's Caſe. Co. lib. 11. fo. 61.

And 7 E. 3. 11. I hold to be a Caſe in the Point: One brought a Writ of Raviſhment againſt the Maſter of Burton Lazar and two Confreres, which were dead Perſons in Law. Theſe two Confreres were apparently to the Court as unable as a Woman Covert, yet there was no Challenge, they were not within the Statute; but Exception was taken to the Clauſe of the Writ Commanding the Sheriff to have the Body to render, to which of the Plaintiffs or Defendants he did belong; whereas to the Confreres he could not belong; which was excuſed, that the Form of the Writ was determined by the Statute, and added that in a Sort they might ſeem a little intereſſed in the behalf of the Hoſpital. And if the Plaintiff were barred, the Ward ſhould not be adjudged to the Defendants. And if the Maſter had joined his Confreres with him, in an Action of Raviſhment, it had abated, for they cannot Demand without Intereſt, but they may do Wrong without Intereſt. 9 Co. 73. a.

And 14. H. 6. 17. A Writ of Raviſhment is brought againſt an Husband and Wife and admitted, and other Matter pleaded in Bar.

And if in this Caſe Doctor Huſſey had been found guilty with his Wife, no doubt they ſhould both have been condemned; and yet for her ſingle Perſon the Caſe hath been the ſame that now it is, that ſhe ſhould not by her ſelf Satisfie, yet ſhe ſhould have been impriſoned, except her Husband had ſatisfied. The Caſe of 38 H. 8. Rot. 347. Comes Rut' verſ. Savage & ſa fem. And Co. l. 5. 14. Eytrue's Caſe of Annuity recovered againſt a Perſon, by Conſent and Aid of Patron and Ordinary. It is a juſt Rule, that Judges are to make ſuch Expoſition of Laws and Statutes, as ſuffer them not to be Eluſory. C. l. 11. Magdalen Coll. Caſe. 11 Co. 73. b.

Statutes that are made in Imitation or Supply of Common Law, shall be expounded according to the Law, and such a Statute is this. And if a Woman sole Ravish and then Marry, the Reason is all one, for there the Fact is the Wives, and must be so laid in her alone, and not upon her Husband; and therefore in that Case if the Husband pay not the Value, she must be imprisoned. But it seemeth that the Value of the Marriage being found, the Husband must answer it, and so it is out of the Case of the Statute, and not like the principal, for the Husband can satisfie, yet the Words are, Si ille qui rapuit de Maritagio satisfacere non potuerit.

2 Instit. 385. 9 Co. 73. a. The Woman may take any thing to the Benefit of her Husband.

Now to the Case 23 E. 3. F. Corone 276. that a Monk or a Woman Covert being appealed Maliciously, and found not Guilty, shall yet have no Damage nor Inquiry against the Abettor. The Words of the Law, Westm. 2. cap. 23. are, that the Person appealed shall have Damages, now they can have none, there is Incapacity indeed in the very Point, yet a Woman may take any thing to the Benefit of her Husband. The Words are that the Party appealed shall have Damages for his Imprisonment and Infamy, which reach both to a Woman Covert, and for the like she with her Husband, and she alone after his Death shall have Action, and the Damages recovered by and for her, and therefore that Case may endure Question.

9 Co. 73.

And it is of no weight that is said, that where the Books of 8 E. 3. 52. and 22 R. 2. do enquire of the Sufficiency of the Defendants, which cannot be in this Case, because the Woman Covert appears to the Law Insufficient: For therefore that Point of Enquiry is saved, and the Judgment Peremptory upon the other. And so though the Statute of West. 2. cap. 12. give an Appeal or Damages, you must not infer thereof that an Appeal cannot be had, but where the Appealor may have Damage, for the Contrary hereof appears 22 E. 3. Cor. 276. Quære of the precedent Judgment against Husband and Wife quod capiantur. Tr. 34 H. 8. Rot. 347. Salop.

11 Co. 27. b.

Second great Point.

As to the second great Point, Whether the Verdict be sufficient or not, I make two Questions of it.

First, whether the Ravisher shall be answerable for the Value of the Marriage, though he were not the Author of the Marriage, but some other without his Act or Consent, or the Ward of his own Will marry himself, for if the Law be so, then is there no Want in the Verdict.

Verdict taken by intendment.

The second, supposing that he be not Answerable, except he were Author of it, whether the Verdict, as it is, shall be taken so by Intendment.

To the first Question.

To the first. At the Common Law, and before the Statute of Gloucester cap. 1. if A. were disseised by B. and B. infeoffed C. or were disseised by him, A. had no Remedy for Damages against the Feoffee, or Disseisor of his Disseisor, but was to bring his Assize against B. which was the immediate Disseisor, and therein he was to recover the mean Profits by way of Damage, not only for his own Time, but also for the Profit received by the Feoffee, or second Disseisor.

2 Cro. 540.

Coke li. 1. Lifords Case 51. 3 Cr. 540. 18 E. 4. 4. a. 16 H. 7. 11. 2 E. 3. 17. 21.

And likewise if A. the first Disseisee had re-entred whereby he had lost his Assize, he might by an Action of Trespass vi & armis brought against his Disseisor, recover the mean Profits for all the mean Possessions, but neither at the Common Law nor now can he Recover upon his Re-entry Damages against the Feoffee, Lessee, or second Disseisor, by Action of Trespass vi & armis, for that fits not his Case as to them who did no immediate Trespass.

And therein the Common Law doth no Wrong to charge the first Disseisor for the Profits not received by him, because the first Disseisor had no Remedy for them against the second Disseisor or the Feoffee. But the first Disseisor had Remedy by Action against the second Disseisor, or was supposed to have received Satisfaction at the Hands of the Feoffee or Lessee, and so paid but where he received.

But now the Reason is clean other in the Case in Question, for the Ravisher of a Ward by his Ravishment gains no Interest in the Body or Custody of the Ward, neither doth the true Guardian lose his Possession by the Ravishment. And therefore if my Tenant by Knight's Service die, his Heir within Age, I am presently in the Possession of the Body without Seisure: And therefore the Trespass at the Common Law, nor the Writ of Ravishment now, doth not as in other Actions of Trespass, Renounce the Property or Possession of the Ward, but doth only punish the Temeraria occupatio, and gives the Plaintiff Damages according to his Hurt, by Abuse or Marriage of the Ward. And in this Case, if another take away the Ward

Ward from the Raviſher, and marry, the firſt Raviſher can have no Action againſt the ſecond, but the very Guardian may have Action againſt them both, and ſhall Recover againſt them both for their ſeveral Raviſhments, 8 E. 3. 52. where it is ſaid that four raviſhed, and a Woman knowing of it did marry him, and they were all charged with the Value; for of the Perſon of a Man there can be no Poſſeſſion without a Right. And therefore Littleton in this Chapter of Confirmation ſays, that if a Man take away my Villain in Groſs, and I confirm his Eſtate in the Villain, the Confirmation is void; but I may give my Words Dedi & conceſſi to him that took him away, or to any other, notwithſtanding ſuch wrongful takings of him, which will be clean contrary to the wrongful taking away of my Beaſt, or any other like Thing. 6 H. 7. 9. Done Br. 24.

And this by Law of Nature, by which all Men are Free, and cannot be brought under the Dominion of any, but according to jus gentium, viz. the Caſe of Captivity, from which our Villenage came. And the Confeſſion in the Court of Record is not ſo much a Creation as it is in Suppoſal of Law a Declaration of rightful Villenage before, as a Confeſſion of other Actions, though it is true as Littleton ſays, that it ſhall not bind his Iſſues Born before, becauſe the Favour of Liberty gives them leave to falſifie. They were called ſervi not a ſerviendo, but a ſervando.

But all this notwithſtanding I am clear of Opinion, that if one raviſh my Ward, and take him out of my Poſſeſſion by wrong, and after that another takes him from him and marries him, or he marries himſelf during his Nonage; that in this Caſe I ſhall and may, by a Writ of Raviſhment of Ward brought againſt my firſt Raviſher, recover not only Damages for the taking of him away, but alſo the Value of the Marriage. And this is to be maintained by Reaſon, by Precedent, and Authority of Books.

By Reaſon: For he that obſerves well the Nature of the Caſe muſt Confeſs, that if the Value be not given againſt the Raviſher for the Marriage happening after (howſoever and by whomſoever) he ſhall make the Law utterly uſory in point of Marriage, for there is no Creature ſo Movable, ſo eaſily and cloſely to be conveyed and kept as a Man, ſo as he may be toſſed from Man to Man to a Hundred in a ſhort time, his Marriage may be Clandeſtine out of the Church, and yet ſuch and ſo many at it, and ſo covertly handled, but it ſhall not be Poſſible to aſſign the certain Perſon that was Author of the Marriage, or elſe that Offence may be aſſigned to him that is unable to anſwer the Value. As in the Caſe of a Woman Covert, if her Husband were not anſwerable as before. And the Raviſher hath no Wrong, if he be made to anſwer the Value of the Marriage, though he had it not, for the true Guardian loſt it by his Means. And I do not regard what the Wrong-doer gains by his Wrong, but what the Owner loſeth by it, when the Law runs to repair the Wrong. For if the Statute of Weſtm. 2. cap. 14. ſay well, Caveat emptor qui ignorare non debuit quod jus alienum emit, much better may it be ſaid here, Reſpondeat raptor, qui ignorare non potuit quod pupillum alienum abduxit. And this is a juſt Uſe of Law in odium ſpolitoris. See Conradius Lagus de plagiariis. If A. corrupt the Servant of B. who thereupon purloyns from his Maſter, the Corruptor ſhall anſwer the Loſs in Duplo, whatſoever becomes of the Goods. Upon the Reaſon here, ſee the like there, 456.

For Precedents: In Books of Entry, in Books of Law, though ſometime the Queſtion to the Jury in Raviſhment of Ward be by whom he was married, which cannot be but well, as old Book of Entries in Raviſhment 11. 17. and 18. the Book 33 E. 3. ff. Judgment 251. found the Marriage, but no Value, nor by whom married, and ſo no Judgment could be given for the Value, but for the Damages only; yet the more Books and Precedents by much, are married, or not generally, without aſking by whom. And the anſwer of the Jury in moſt Caſes is, that they know not whether married or not, [yet note, that it was much harder to find by whom married, than whether married at all;] and therefore they make their Verdict continually, if married, ſo much for the Marriage beſides Damages; if not married, the Body, and ſo much for Damages only. And then the Judgment is Conditional, but for the Body and the Damages. And if 9 Co. 74. a.

the Sheriff return that he is married, then the Plaintiff ſhall have a ſcire fac. for the Value of the Marriage found by the Jury 33 H. 6. 3. and 45 E. 3. 16. And 9 H. 6. 61. Babington asketh the Jury whether the Ward were married; generally, they anſwer, No, yet the Verdict is made conditional, ſo much for the Value if he be married, generally, without ſaying by whom.

Praxis Judicum eſt interpres Legum.

Note, in theſe Caſes when there is no Marriage found, and yet the Verdict gives the Value, if he be married, or ſhall be married before he can come to the Body unmarried, it follows that this muſt extend to Marriage by whomſoever. To the ſame Effect is 21 E. 3. 44. and 19 E. 3. ff. Judgment 123. and 19 E. 3. Fitz. Judgment 172. and 17 E. 3. ff. Judgment 116. 29 E. 3. 24. Coke lib. Ent. pl. 8. ſcilicet ultimo in Raviſhment.

All theſe Books and Precedents of Marriage found generally, not ſaying by whom.

If a Ward be raviſhed within Age, and a Writ of Right of Ward be brought, the Defendant may plead that he is come to Age, hanging the Writ, for that is to demand the Body as a Ward. But if it were a Writ of Raviſhment of Ward, it would be otherwiſe, 9 E. 4. 50. 37 H. 6, 7. and 24 E. 3. 49. And the old Book of Entries Warde en Raviſhment 18. enquires whether the Ward were married, or come to full Age, as inferring, that though he were not married, yet if during the Raviſhment he were come to full Age, the Raviſher ſhould anſwer the Value, becauſe the Guardian could not now have his Marriage.

Alſo Coke, lib. Intr. Raviſhment ult. the Raviſher was condemned in the Value, when the Ward died unmarried and within Age after the Raviſhment, for the Guardian loſt the Marriage. But note, the Stat. of Weſtm 2. cap. 35. in Queſtion, is expreſs in that Caſe, ſo that Caſe may grow by Force of the Statute.

Another Point is, that if the Guardian gets Poſſeſſion of his Ward again unmarried after the Raviſhment, he may have Damages for the taking, but he ſhould not have the Value againſt him upon the Raviſhment: The Reaſon is Plain, and for that ſee, 27 H. 6. gard. fo. 118. which is the Precedent old Book of Entries, gard tit. Raviſhment pl. 12. and the old Book of Entries, gard. in Raviſhment 11. where the Jury find inter alia, that the Guardian could never have the Poſſeſſion of the Ward after the Raviſhment.

But touching this principal Point, how a Raviſher ſhall be charged with the Value though another marry the Ward, the two great Caſes relied upon, and preſſed by me by way of Diſtinction were 8 E. 3. 52. and 8 E. 3. 45. whereof the firſt is, one brought a Writ of Raviſhment againſt four Men and a Woman, they all plead not Guilty, and the Jury find that the four Men raviſht the Ward, and not the Woman. But they find withal, that the Woman knowing of the Raviſhment did marry him to her Daughter, and the Court condemned them all in the Value; whereof the Conſequence muſt be, that though the Marriage by her might be holden of it ſelf a Raviſhment, and ſo they all Guilty as of ſeveral Raviſhments, yet they could not have been condemned in the Value, being no Parties to the Marriage but that they were made liable, becauſe the Marriage was made whilſt the reſt ſtood Deforceors and Raviſhers.

And note, that the Statute brands the Raviſher with the Title cujus extitit malæ fidei poſſeſſor.

But the other Caſe 8 E. 3. 45. was, that one brought a Writ of Ward againſt Alice, and demands R. Son and Heir of I. as his Ward; Alice came in and ſhe ſaid, that ſhe claimed nothing in the Ward but Nurture, and now in the Court ſhe tendred him to the Plaintiff, who refuſed him becauſe ſhe was married; ſhe anſwered, he was not married by her; the other replied, that ſhe was married in her Guard, after ſhe became Deforceor, for which Time ſhe was to anſwer. Unto which it was ſaid for her, that in as much as ſhe came Lawfully to the Poſſeſſion of the Ward, and did render him at the firſt Day, ſhe could not be counted a Deforceor, and ſo ſhe was not amerced. But there was Judgment by agreement that ſhe ſhould yield the Ward and 20 Pounds, for here ſhe was clean Contrary bonæ fidei poſſeſſor, and therefore was not to anſwer but for her own Act; for her Poſſeſſion being

ing from the Beginning Lawful and without Wrong, cannot be wreſted to other Mens Wrongs.

And ſo in Concluſion upon ſolemn and ſeveral Arguments of all the four Judges, Judgment was given for the Plaintiff, with a full and uniform Conſent of the whole Court, Nichols, Winch, Warberton and my ſelf; which Judgment was given and pronounced in the Court, Paſch. 14. Reg. Jac. &c. and entred thus:

Ad quem diem hic venerunt tam præd. Franciſcus quam præd. Jac. & Katharina, Robertus, Johannes Woodford & Cuthbertus per Atturnatos ſuos præd. Et ſuper hoc viſis præmiſſis, & per juſticiarios hic plene intellectis, conſideratum eſt quod præd. Franciſc. recuperet verſus præfat' Jac. Katharinam. Robertum, Johannem Woodford prædict' octogint' libras pro valore Maritagii præd. & damna ſua præd. ad decem libras & decem ſolidos per jurat' præd' in forma præd. aſſeſſa, nec non quadraginta libr' & decem ſolid' eidem Franc. ad requiſitionem ſuam pro miſis & cuſtagiis ſuis prædict' per Curiam hic de incremento adjudicat. Quæ quidem valor & damna in toto ſe attingunt ad octogint' quinquaginta & unam libr'. Et præd. Katharina, Robertus & Johannes Woodford capiantur ad habendum priſonam duorum annorum juxta formam ſtatuti, &c. Et præd Franc. in miſericordia pro falſo clamore ſuo verſus præfat. Jac. & Cuthbertum de tranſgr. & raptu præd. unde præd. Jac. & Cuthbertus per jur. præd. ſuperius acquiet. exiſtunt: igitur iidem Jac. & Cuthbertus eant inde ſine die, &c. This Judgment was reverſed in the King's Bench, only, becauſe there were no plegii de proſequendo entred for the Plaintiff, for they took it not to be within the Remidy of the Statute of Jeoffails, becauſe they held it a Penal Law, and ſo excepted. But Haughton Juſtice, was of a contrary Mind. The Penalty muſt be in the certain Impriſonment of two Years, for the reſt is but as in Treſpaſs at the Common Law.

1 Brnl. 361. Herl. 59. 2 Cr. 92, 339, 594. 1 Ro. 445. Syd. 84. 2 Cr. 414, 534. This Judgment reverſed in the Kings Bench. 2 Cro. 413. Dy. 288. a. Hutt. 92. que eſt matter de Subſtance.

(128) G. Digby *againſt* Martha Fitzharbert. Trin. 13 Jac. Rot. 2560.

Derby. Waller.

GEorge Digby brings a Quare Impedit againſt Martha Fitzharbert, and declares that Thomas Fitzharbert Eſquire was ſeiſed of the Manor of Narbury with the Advowſon in Fee, and preſented one Brown; and then granted the next Avoidance unto the Plaintiff, and now Brown is dead, &c. Martha ſays, that Thomas Fitzharbert Knight was long before, &c. ſeiſed of the Manor, &c. in Fee, and preſented one Murrain, and afterwards infeoffed one Richard Fitzharbert in Fee-ſimple, who conveyed the ſaid Manor unto the ſaid Tho. Fitzharbert for the Life of one Bamford, the Remainder to one Anthony Fitzharbert in Fee; and then Murrain died, and Thomas Fitzharbert preſented Brown, and then granted the next Avoidance unto the Plaintiff, and then Bamford died; and then Anthony Fitzharbert entred, and made his Will, and gave the Manor, &c. unto Martha for her Life, and died, and then Brown died; and then ſhe preſented the Clerk, and traverſed without that, that the ſaid Thomas Fitzharbert at the Time of the Grant made to the ſaid George Digby was ſeiſed of the Manor in Fee, &c. prout, &c. The Plaintiff replies and maintains his Declaration, and traverſeth without that, that the ſaid Thomas Fitzharbert at the time of the Grant made by him unto the Plaintiff, was ſeiſed of the ſaid Manor for the Term of the Life of Bamford, prout the Defendant alledged, and thereupon it is demurred in Law.

Quare Impedit declared upon Seiſin and Preſentment avoided, and the Seiſin alſo traverſed. Moor f. 869.

The Caſe in the Argument I divided into four Queſtions.

The firſt Queſtion, Whether the Defendant's Plea had been good without Traverſe of the Seiſin in Fee? 1.

Another Queſtion, Whether the Defendant have not Election either to Traverſe or not, but to leave it as a Confeſſion and Avoydance, and then the Traverſe hath come aptly, as it is on the other Side. 2.

A third, Whether the now Defendant having taken a Traverſe hath not ſo locked up the Plaintiff, as he hath no Choice but to join upon that to avoid Infinity. 3.

Laſtly,

4. Laſtly, Whether if the Plaintiff hath Power to reſort to traverſe the Defendant's Inducement to his Traverſe, yet he hath taken that Traverſe right, or ought to have given it more Scope by a modo & forma.

To the firſt Point. To the firſt, 26 H. 8. 4. by the Opinion of Fitzharbert, is that upon ſuch Account of Seiſin in Fee, &c. in a Quare Imped. againſt Prior, the Defendant pleaded a Grant to the Plaintiff of a Prochein Avoidance; the Defendant needs not Traverſe the Seiſin in Fee, becauſe it was a Confeſſion and Avoidance, Quod nullus negavit, which is leſs than a conceſſum only, Qui tacet conſentire videtur.

Vaugh. 56. Accord. It is true alſo, that Brook makes a mirum of it in the Abridgment of it, and 2 E 4. 11. is to the ſame Purpoſe thus:

In an Aſſiſe, if the Defendant plead that I. S. was ſeiſed in Fee and infeoffed him, the Plaintiff may ſay, that himſelf was ſeiſed in Fee and granted unto I. S. for his Life, who infeoffed I. D. upon whom he entred without a Traverſe, as being confeſſed and avoided.

And therefore I incline to hold the Opinion of Fitzharbert, 26 H. 8. 4. for Law, becauſe at the Preſentment executed without more but makes a Fee, and proves a Fee, and therefore if the Defendant ſhews that the Preſentment was ſuch as neither made nor proved Fee, it is a Confeſſion and Avoidance ſufficient.

For a Preſentment is indifferent, and works as the Root is from whence it grows. As for Example, here as the Plaintiff lays it, it is the Fruit of an Eſtate in Fee, and ſo ſettles and proves a Fee-ſimple in the Plaintiff, or in Thomas Fitzharbert that granted the next Avoidance to him; but as the Defendant makes the Caſe now, the ſame Preſentment neither gave nor proved Fee-ſimple in Thomas Fitzharbert, but was under his Title for the Life of Bamford, and after made for the Right of the Defendant, according to her Eſtate.

15 H. 8. ff. Qua. Imp. 77. the Plaintiff in Quare Imp. declared, that his Anceſtor was ſeiſed in Fee of the Manor, to which, &c. and preſented, and then he brought the Manor to himſelf.

The Defendant ſaid, that long after that he was ſeiſed of the Advowſon in Fee, and preſented, and now preſented again, and holden good clearly without traverſing the Appendency, for this latter Preſentment had confeſſed and avoided the Appendency.

And now upon this I hold, that if the Defendant had not joined the Traverſe to his Plea, that his Plea had been good, and the Plaintiff might properly have made the Traverſe that he makes, for then the Traverſe had fallen properly to his turn upon an Affirmative Plea of the Defendants, his Traverſe not being prevented by the Defendant's Traverſe.

2 Point. But now to the ſecond Point. As I incline that the Plea of the Defendant might have ſtood without a Traverſe, ſo I am clear of Opinion, that the Traverſe added by the Defendant is better and more ſure than the other Part of the Plea without the Traverſe would have been. And note, that M. 26. H. 8. doth not ſay in that Caſe that he might not Traverſe, but (ne beſoigne) he need not.

Now for this know, that though it be true, that a Preſentation may make a Fee without more, that you never have a Declaration in a Quare Imped. that the Plaintiff did preſent the laſt Incumbent without more; but you declare, that the Plaintiff was ſeiſed in Fee and preſented, or elſe lay the Fee-ſimple in ſome other, and then bring down the Advowſon to the Plaintiff, either in Fee or ſome other Eſtate, and ſo are both 26 H. 8. 4. and 15 H. 6. f. Quare Imp. 71. before recited. The Reaſon thereof is, that a Preſentment alone in the Plaintiff is militant and indifferent, and may be in ſuch a Title, as may prove that this new Avoidance is the Defendant's; and therefore you muſt lay the Caſe ſo as by the Title you make the Preſentation paſt joined to the Title, prove that this Preſentation is yours too. Why then obſerve, there is in this Declaration two Points material, ſcil. a Seiſin in Fee and a Preſentation. To the Preſentation the Defendant hath given anſwer, but Argumentally by two Affirmatives one againſt another, and therefore the Traverſe to that is good, and without it, it is but reſponſum dimidiatum; and yet it is true, that as well as Preſentation, as the Iſſue in Fee, is to be anſwered for the Cauſe aforeſaid.

Vaugh. 11, 59.

The

The Caſe that moved me a little to doubt was this, that I. S. be ſeiſed of an Advowſon in Fee, and I. D. Uſurps upon him, now he hath gained the Fee, and therefore when the Advowſon next avoids again, the Preſentation is his. Now if I. D. declared in his Quare Imped. upon a Seiſin in Fee at the Time of former Avoidance which he uſurped, that is Falſe; and ſo the Defendant I. S. may, by ſuch an Inducement as is here, traverſe his Seiſin in Fee and trice him, and yet he hath the Right. 10 H. 7. 27. 1 And. 270, 278. Vaug. 11. q' l'; Preſentation ſolent' traverſable in ceſt Caſe.

To this I anſwer, that in that ſpecial Caſe, he muſt declare according to his Caſe, and to the Truth, and not in the Common Form, that is, he ſhall declare that I. S. was ſeiſed in Fee, that the Church voided and he preſented, and now it is void again. As Fitz. N. B. 33. if one Recover an Advowſon in a Writ of Right, he ſhall lay the laſt Preſentation in the Perſon againſt whom he recovered. So when a Patron ſues a Quare Imped upon an Appropriation diſſolved. Now the Caſes put by my Brother Warberton out of 3 H. 4. and 14 H. 6. 16. they are clear, for there the whole Plea was confeſſed and avoided, and then he cannot add a Traverſe, which makes the Difference, for here the Confeſſion and Avoidance was but to Part. N. B. 36. a. Yelv. 157, 221. 2 Cro. 299.

Now the Caſes of late Reſolutions are clearly for me, ſcil. 14 Eliz. Dyer 312, and 288. and 21 Eliz 365. Leak's Caſe, which is much ſtronger; where a Man having pleaded himſelf ſeiſed in Fee of a Cloſe adjoining, upon the Point of a Treſpaſs, for Default of Senſe the other was allowed to traverſe the Seiſin in Fee, and yet any leſs Eſtate would have ſerved him for a Licenſe to put his Beaſts into the Cloſe adjoining, but becauſe he took upon him to plead his own Eſtate eſpecially, he gives Advantage to his Adverſary; and the Caſe we judged lately between Newman and More ſup. which alſo had been formerly adjudged in that very Point, proves that Traverſe may well be allowed, where the Plea was before confeſſed and avoided, much more here where the Point traverſed was no whit touched or confeſſed. Dy. 280. b. 80 Ant.

Now to the third Point, I hold it clear, for theſe Rules muſt ſtand undoubted, Actori incumbit probatio, & melior & tutior eſt conditio poſſidentis, for when you will Recover any thing from me, it is not enough for you to deſtroy my Title, but muſt prove yours better than mine. Third Point. 2 Cr. 288. Poſt. 162.

Why then take the Caſe of 27 H. 8. 2. which is, that if one plead a falſe Plea, and his Adverſary Traverſe that with an Inducement, which alſo is Falſe, yet he ſhall have Advantage of his Traverſe. The Caſe is there which is alſo in 15 H. 7. 2. in Treſpaſs, the Defendant pleads, that the Plaintiff leaſed I. S. and brings that Term to himſelf by Aſſignment. The Plaintiff cannot Traverſe the Aſſignment, and if he do, and it paſs to him, he ſhall not have Judgment, but yet in that Caſe, if the Plaintiff convey himſelf to his own Leaſe by Surrender, now he ſhall Traverſe the mean Aſſignment, and have Advantage of it, being the firſt Falſity. Now ſhall the Defendant in that Caſe come again, to have that Traverſe, and Traverſe Surrender? I hold clearly no, for that were Infinite; and ſo I hold in the Caſes cited before, ſcil. 14 Eliz. and 21 Eliz. and ſupra in this Book Newman and More's Caſe, that there could not be Traverſe upon Traverſe. Ant. 80.

7 E. 4. 26. Aſſ. The Defendant pleaded that I. S. recovered the Land againſt the Plaintiff, whoſe Eſtate the Defendant hath by Rogers, the Plaintiff may ſay that I. S. enfeoffed him after Recovery abſque hoc, that the Defendant hath his Eſtate, now the Defendant cannot Traverſe the Feoffment to the Plaintiff. That that would ſerve upon a not Guilty may be loſt by ſpecial Pleading.

Yet note in the Caſe 27 H. 8. 2. if the Defendant had pleaded not Guilty, the Iſſue ſhould have been found for him: Therefore let a Man take heed in Pleading, for if he leave the general Iſſue, or plead falſely or unadviſedly, the other Party ſhall be allowed his fit Replies or Defences to the Plea, and Caſe, as it appears, without Reſpect to that that might have been pleaded better.

And note that there are general Iſſues, that need no Inducement as not Guilty, Nihil debet, ne diſturba pas, which is the Ordinary Plea in theſe Caſes. But if a Man will leave the general Iſſue and controvert the Title, he muſt inable himſelf by ſome Title of his own to do it, but yet that is not the principal Part of his Plea, but a formal Inducement only, and Vaugh. 51. Contract. B. 19.

therefore

therefore there is no Senſe if you will quarrel my Poſſeſſion, and I avoid the Title effectually (and ſo for my Sake muſt and do induce that with a Title of mine own) that you ſhall flie upon my Title, or forſake your own; for you muſt recover by your own Strength, and not by my Weakneſs.

1 Cr. 105. Vaug. 62. 1 Saund. 21. Hutt. 97.

So I ſay regularly, that whenſoever a Traverſe is taken apt and material to the Plaintiff's Title, the Plaintiff is bound to it, and cannot for the ſame Thing leave it, and force the Defendant to accept another Traverſe tendred by him, and there is no Caſe in the Law againſt this Rule as I lay it.

Co. L. 282. b. 2 Saund. 295.

The Caſes 20 E. 4. 2. 12 E. 4. 6. 2 R. 3. 9. are agreed, and the Law and Reaſon is clear ſo; if a Man bring an Action of Treſpaſs, for breaking his Cloſe on a certain Day, if the Defendant plead a Releaſe of Actions, he ſhall Traverſe all Treſpaſſes after; if a Feoffment, he ſhall Traverſe all Treſpaſſes before; if a Licenſe for once, all before and after. Now hath the Plaintiff Choice to leave the Traverſe, and traverſe the Point of Juſtification, ſcil. the Releaſe, Feoffment or Licenſe, or he may alledge a Treſpaſs before or after, and ſo join upon the Traverſe offered: This is indeed a Traverſe after a Traverſe, but it is not a Traverſe upon a Traverſe, to the ſelf ſame Point, as I gave my Rule, and as the Caſe is here to one ſame Preſentation. For now note, when a Man brings an Action of Treſpaſs, for breaking of his Cloſe one Day, he may maintain his Action by any one of 100 Treſpaſſes before his Action brought, which is the Cauſe, that though the Defendant juſtifie for all that Day, yet he muſt Traverſe before or after, ſo now the Treſpaſs juſtified is one, and that traverſed is another. Now if the Plaintiff Traverſe the Point of Juſtification, that is to one Treſpaſs, and is no Traverſe upon a Traverſe. If he do aſſign a Treſpaſs within the Time of the Traverſe, to join upon the Traverſe, tendred according to my Rule, it varies not in that Point, from the firſt Traverſe, ſee how clear this is.

1 Inſt. 283. a. 2 Cro. 366. 1 Cro. 514. 1 Cro. 228, 229, 501, 515. 2 Cro. 202. 1 Syd. 308.

Note, it was holden 38 Eliz. in Com. Ban. in Paramour and Vorald's Caſe, which vide in Popham 101. That a Traverſe may be upon a Traverſe when Falſity is uſed to ouſt the Party of the Benefit which the Law gives him. Vaugh. 62.

The other Caſe objected is Long, 5 E. 4. 100. as is well collected in the End of the Caſe by Danby. A Man brings an Action of Waſte for felling of Trees, and lays that the Leſſee felled and ſold them; the Defendant confeſſes that he felled them, but ſaith, that he beſtowed them in repairing the Houſe abſque hoc, that he ſold them. The Plaintiff may reply, that he let them not, or any like Caſe of Waſte abſque hoc, that he employed them to Reparations, and this indeed is directly to the ſame thing, and Traverſe upon Traverſe. But this I affirm clearly by another Caution of my Rule, that this firſt Traverſe was not Material, nor to a Point Material, for the Plaintiff might have declared of the Selling only, and the other Point was meer Surpluſage. And therefore though perhaps if the Plaintiff had joined upon it, and it had been found for him, he ſhould have had Judgment, yet clearly he was not bound to the Plea, as not final to the Action, and therefore clearly in that Caſe, the Plaintiff might have demurred upon the Defendants Plea, as reſting upon a thing not Material, in all which Reſpects it differs clearly from the Principal Caſe we lately judged, between Sir John Sherley and his Wife Defendants againſt Barbara Wood ſup. in this Book. When the Tenant pleaded a Jointure made to the Defendant, and Acceptance of it after the Husband's Death, the Demandant may plead a Refuſal, after the Death of the Husband, without traverſing the Acceptance, for it was not Material of her Part to plead, but that muſt riſe of the Part of the Refuſer.

Ante. 71.

Then there remains no Caſe objected nor to be objected to withſtand me, but Sapcot's Caſe cited 2 R. 3. F. Iſſue 128. and the ſame 22 H. 7. Co. Reports 97. which is indeed the very ſame with the Principal in 2 R. 3. it is but Townſend for the ſecond Traverſe, and Cotteſmore againſt it.

In 22 H. 7. it is reported that after Debate Iſſue was taken upon the ſecond Traverſe. This is all the Authority (which I value not) for no doubt but that Iſſue may be taken upon it; but the Queſtion is, whether it can be inforced, the Party ſtanding and demurring upon it, as it is here.

Againſt this I oppoſe the Caſe judged Paſche 37 Eliz. Rot. 2278. Woodroffe brought a Quare Imped. againſt John Cotford for the Vicarage of Stepney in Midd.

Midd. and laid that one Richard Leighton, Parſon there, whereunto the Vicarage belonged, did leaſe the Parſonage to Thomas Lord Cromwel, Gregory and Richard Cromwel for Eighty Years, and that Thomas and Gregory died, and that Richard ſurvived, and gave the Leaſe to his Executor for Ten Years, and the Remainder to Francis Cromwel.

That the Executor agreed unto the Deviſe to Francis, and after Ten Years he entred, and brings down that Intereſt unto the Plaintiff, who preſented one Anthony Anderton, and now upon this Avoidance he Preſents again, the Term enduring.

The Defendant Cotford ſaith, that Gregory Cromwel ſurvived, and granted to the Plaintiff the firſt and next Avoidance, and then granted his Term to the Defendants, and then the Church became void again, and ſo the Defendant preſented, and traverſeth abſque hoc quod præd. Richardus ſupervixit Thomam & Gregorium Cromwel prout, &c.

The Plaintiff maintaineth his Declaration in omnibus abſque hoc quod præd. Gregorius did Grant to the Plaintiff the firſt Avoidance, prout, and then demurred; and after two or three Terms Advice it was adjudged, that the Replication was Inſufficient in Law, and ſo adjudged nihil Capiat per billam; which in Effect is all one with the Principal Caſe, for the Preſentment for the Plaintiff was avoided as here, and yet they Traverſe the General Title of the Plaintiff, and that was the Root of that Preſentment, which the Plaintiff was not permitted to forſake, and to offer a ſecond Traverſe to that that did avoid his Preſentment, as the Plaintiff would here in the Principal Caſe, ſo this is a full Judgment in the very Point.

Now to the laſt Point, If the Plaintiff ſhould be admitted to a ſecond Traverſe, yet he ſhould not have taken it ſo Strictly and Preciſely to the Eſtate for the Life of Bunford, becauſe if the Eſtate had been for the Life of any other, who had been Dead, or had been any otherwiſe Inſufficient, ſo that it could not Contain the Plaintiff's Title to his Avoidance, it had been all one, and therefore the Traverſe ſhould have been abſque hoc that Thomas Fitzharbert was ſeiſed tempore Conceſſionis modo & forma prout, &c. for that would have allowed the Defendant to make Proof of any other Seiſin, that might have diſabled the Grant as well as the Life of Bunford; like unto the Caſe of Conſimili caſu. Where the Demandant counts of an Alienation in Fee, yet the Defendant ſhall make his Traverſe to the Alienation modo & forma, and then the Demandant ſhall maintain the Iſſue by an Alienation in Fee or in Tail, or for Life, for they are all alike Material. To this there can be no other Anſwer given, but that the Defendant's Plea upon that particular Eſtate gives the Plaintiff his Traverſe accordingly; which I retort upon the Plaintiff, that ſince he hath laid the Seiſin in Fee, he hath given the Defendant juſt Advantage to traverſe it.

4 Pont. 2 Cro. 202.

Yel. 123.

Yel. 195. Dy. 365. b. Poſt. 119.

This was my Opinion and Argument upon this Caſe, and my Brother [Winch] arguing before had holden, that the firſt Traverſe was well taken, and the ſecond not well, ſo he and I agreed. But my Brother [Nichols] and [Warburton] had argued to the Contrary. And ſo it reſts.

(129) Lampleigh *verſus* Brathwait. Mich. 13 Jac. Rot. 712.

Aſſumpſit London.

ANthony Lampleigh brought an Aſſumpſit againſt Thomas Brathwait and declared, that whereas the Defendant had Feloniouſly ſlain one Patrick Mahume, the Defendant after the ſaid Felony done, inſtantly required the Plaintiff to labour, and do his endeavour to obtain his Pardon from the King: Whereupon the Plaintiff upon the ſame Requeſt did, by all the Means he could and many Days Labour, do his Endeavour to obtain the King's Pardon for the ſaid Felony, viz. in Riding and Journeying at his own Charges from London to Roiſton, when the King was there, and to London back, and ſo to and from New-market, to obtain Pardon for the Defendant for the ſaid Felony. Afterwards, ſcil. &c. in Conſideration of the

Aſſumpſit and of Conſideration generally Moo. 866. meſme. Brownl. 7. 2 Keeb. 666. p. 28.

Premiſſes, the ſaid Defendant did Promiſe the ſaid Plaintiff to give him 100 Pounds, and that he had not. &c. to his Damage 120 Pounds.

To this the Defendant pleaded Non Aſſumpſit, and found for the Plaintiff Damage one Hundred Pounds. It was ſaid in Arreſt of Judgment, that the Conſideration was paſſed.

But the chief Objection was, that it doth not appear, that he did any Thing towards the obtaining of the Pardon, but Riding up and down, and nothing done when he came there. And of this Opinion was my Brother [Warburton] but my ſelf and the other two Judges were of Opinion for the Plaintiff, and ſo he had Judgment.

Cr. Car. 408, 409. Ow. 144. Styl. 465. 3 Cr. 591, 282, 715. 2 Cro. 18. Mo. 866. Syd. 38, 413. 425. Hutt. 85. Yelv. 41. 1 Cro. 409. 3 Cro. 42, 442, 715, 741. Accord, one Hobart Owen, 144. q' aſſne giſt comt' ſoit preceed Requeſt. 1 Ro. 13. 3 Cr. 42, 94, 194. 1 Ro. 11. Jones, 365.

Firſt, It was agreed, that a meer Voluntary Courteſie will not have a Conſideration to uphold an Aſſumpſit. But if that Courteſie were moved by a Suit or Requeſt of the Party that gives the Aſſumpſit, it will bind, for the Promiſe, though it follows, yet it is not naked, but couples it ſelf with the Suit before, and the Merits of the Party procured by that Suit, which is the Difference. Paſch. 10 Eliz. Dyer 272. Hunt and Bates. See Oneley's Caſe, 19 Eliz. Dyer 355.

Then to the main Point it is firſt clear, that in this Caſe upon the Iſſue Non Aſſumpſit, all theſe Points were to be proved by the Plaintiff.

1. That the Defendant had committed the Felony, prout, &c.
2. Then that he requeſted the Plaintiff's Endeavour, prout, &c.
3. That thereupon the Defendant made his Proof, prout, &c.
4. That thereupon the Defendant made his Promiſe, prout, &c.

For whereſoever I build my Promiſe upon a Thing done at my Requeſt, the Execution of the Act muſt purſue the Requeſt, for it is like a Caſe of Commiſſion for this Purpoſe.

Difference upon a Promiſe paſt and to come upon a Conſideration. Yel. 171. 1 Cr. 201. 1 Le. 255, 340. 2 Cr. 234.

So then the Iſſue found ut ſupra is a Proof that he did his Endeavour, according to the Requeſt, for elſe the Iſſue could not have been found, for that is the Difference between a Promiſe upon a Conſideration executed and executory, that in the executed you cannot Traverſe the Conſideration by it ſelf, becauſe it is paſſed and incorporated and coupled with the Promiſe. And if it were not indeed then acted, it is nudum pactum.

Ant. 24. Yelv. 134. Ante 88. 7 Co. 10. b. Ant. 41, 88. 4 Co. 94. a. *b.* 7 Co. 38. Yel. 134.

But if it be Executory, as in Conſideration, that you ſhall ſerve me a Year, I will give you Ten Pounds; here you cannot bring your Action 'till the Service performed. But if it were a Promiſe on either Side Executory, it needs not to aver Performance, for it is the Counter-promiſe, and not the Performance, that makes the Conſideration; yet it is a Promiſe before, though not binding, and in the Action, you ſhall lay the Promiſe as it was, and make ſpecial Averment of the Service done after.

3 Cr. 250. 1 Ro. 43. p. 10, 40. p. 29.

Now if the Service were not done, and yet the Promiſe made, prout, &c. the Defendant muſt not Traverſe the Promiſe, but he muſt Traverſe the Performance of the Service, becauſe they are diſtinct in Fact, though they muſt Concur to the bearing of the Action.

Then alſo note here, that it was neither required, nor promiſed to obtain the Pardon, but to do his Endeavour to obtain it, the one was his End, and the other his Office.

Mo. 595. 2 Keb. 367. p. 6.

Now then he hath laid expreſly in general, that he did his Endeavour to obtain it, viz. in equitando, &c. to Obtain. Now then, clearly, the Subſtance of this Plea is General, for that anſwers direcly the Requeſt, the Special aſſigned is but to inform the Court; and therefore clearly, if upon the Trial he could have proved no Riding, nor Journeying, yet any other effectual Endeavour according to the Requeſt would have ſerved, and therefore if the Conſideration had been that he ſhould endeavour in the Future, ſo that he muſt have laid his Endeavour expreſly, and had done it as he doth here, and the Defendant had not denied the Promiſe, but the Endeavour, he muſt have traverſed the Endeavour in the General, not the Riding, &c. in the Special; which proves clearly, that is not the Subſtance, and that the other Endeavour would ſerve. This makes it clear, that though Particulars ought to be ſet forth to the Court, and thoſe Sufficient, which

Yelv. 11.

3 Cr. 179.

were

were not done, which might be Cauſe of Demurrer, yet being but Matter of Form, and the Subſtance in the General, which is here in the Iſſue and Verdict, it were cured by the Verdict: But the Special is alſo well enough; for all is laid down for the obtaining of the Pardon which is within the Requeſt; and therefore ſuppoſe he had ridden to that Purpoſe, and Brathwait had died, or himſelf, before he could do any thing elſe, or that another had obtained the Pardon before, or the like, yet the Promiſe had holden. Yel. 11.

And obſerve that Caſe 22 E. 4. 40. Condition of an Obligation, to ſhew a ſufficient Diſcharge of an Annuity, you muſt plead the Certainty of the Diſcharge to the Court; the Reaſon whereof, given by Brion and Choke is, that the Plea there contains two Parts, one a Trial per pais, ſcil, the Writing of the Diſcharge, the other by the Court, ſcil. the Sufficiency and Validity of it, which the Jury could not try, for they agree, that if the Condition had been to build a Houſe agreeable to the State of the Obligee, becauſe it was a Caſe all Proper for the Country to try, it might have been pleaded Generally, and then it was a Demurrer, not an Iſſue, as is here. 9 Co. 25. a. Mo. 183. 3 Cro. 192. Plow. 7. a

(130) Wilſon *againſt* the Biſhop of Carlile. Trin. 13 Jac. Rot. 3474. Prohibition.

THomas Wilſon brought a Prohibition againſt Henry Biſhop of Carlile, and ſaid, that there was within the Pariſh of Grayſtock this Cuſtom for tithing of Wool amongſt others, that if any Inhabitant have five Fleeces of Wool or above, that then ſuch Inhabitants, after the Sheering and Binding up of the ſaid five Fleeces abſque fraude & dolo fidelitur ſolvent Rectori poſt monitionem, &c. apud oſtium domus manſionalis ejuſdem inhabitantis infra parochiam præd. Decimam partem inde abſque aliquibus viſu vel tactu novem partium ejuſdem lanæ reſid. per Rectorem, &c. Habendum vel ſcrutandum in plenam, &c. And that the Parſons, &c. have ſo accepted it; and then lays, that the Biſhop of Carlile pretending himſelf Parſon or Commendatory, &c. the Biſhop pleads himſelf the Parſon or Commendatory of the Church by Preſentation, &c. from the Counteſs of Arundel; and yet ſhews, that his Faculty and Confirmation was ſo long as he ſhould remain Biſhop of Carlile, which may well ſtand together, that he may be Parſon abſolute, yet qualified by his Faculty to hold it but for a Time, and then to this Cuſtom demurred in Law. And it was this Term adjudged for the Biſhop with one Conſent; for the Subſtance of the Preſcription is laid, that the very true Tenth is and ought to be paid without Fraud, which is not Preſcriptible, for it is Common Right, then the ſole Point Preſcriptible is, that this is without View or Touch of the nine Parts, which is in Effect repugnant to the other, for when you have laid Truth in the former Part, you lay the Way to Fraud in the latter, for it is againſt Common Reaſon that any Man judge or divide for himſelf, and then take Choice of his own Diviſion; againſt the Rule of Partition Litt. For the Truth of the Tenth depends upon the Proportion it holds with the nine Parts, and therefore for the Pariſhioner, which is in the nature of an Adverſary to the Parſon in this Caſe, to ſet out a Part for the Tenth, which he only affirms to be juſt, is to give him meerly Power to Tithe as he liſts, and the Preſcription were as Reaſonable as to ſay plainly, that they might ſet out what Tithe they liſt. Cumberland. Brownlow. 1 Ro. 647. Cuſtom of Tithing truly without view of the Perſon. Poſt. 156. 2 Cr. 692. 3 Cr. 263. Mo. 278.

4 E. 6. 6. The Guardian, that tenders a Marriage, muſt preſent the Perſon to the Ward. And it is a weak Anſwer to ſay, that if it be not a juſt Tenth he may refuſe it and ſue for his Due. For firſt, he hath no Means to be aſſured whether it be true or not, ſe his Suit may be Cauſeleſs, ſure he may be, it will be Fruitleſs: But the Law was provided not directly to ingender, but to prevent Suits, and therefore provides, that Things be done by indifferent Means and Perſons, that there be no juſt Suſpicion of indirect Dealing.

If a Man were Judge in his own Caſe and judged amiſs, a Writ of Error would redreſs it; ſo if a Biſhop diſturb, or would not admit the Clerk, he might be compelled; yet the Law provides better, that is, that you have

pour Right, and therefore that your Means be ſuch as is likely to produce it, you may Challenge the Array or the Polls, yet you ſhall remove the Venire fac. to another Officer, as the Coroner, where the Sheriff is ſuſpected in Law by a Proviſional Challenge afore to avoid Delay, which is a Kind of Injury.

Replevin. Surrey.

(131) Brown *verſus* Goldſmith. Tr. 13 Jac. Rot. 607.

Doubleneſs of Pleading. Mo. 870. 21 H. 8. c. 19.

Avowry for Rent-ſervice according to the Statute of 21 H. 8. upon the Land admits Plaintiff to all Pleas.

THomas Brown **Plaintiff againſt** Thomas Goldſmith **Defendant, in a Re**plevin for taking a Brass Kettle at Cobham in Surrey, 21 Apr. 12 Jac. **the Defendant Avoweth, as Bailiff to the Dean and Canons of** Windſor, **that one** Robert Parſon **held the Place of the Dean and Canons, as of their Ma**nor of Hampton **Court in the ſaid County of** Surrey **and** Middleſex, **by Rent and Suit of Court; that** Robert Parſon **being ſummoned did not appear at a Court holden in the ſaid Manor, that for Suit he did diſtrain, and make Conuſance, as in Land holden of the Dean, &c. The Plaintiff confeſſeth the Seiſin of the Dean and Canons, and the Tenure: But further ſaith, that the ſeventh Day of** April, An. 9 Eliz. **the ſaid Dean and Canons did Leaſe by Indenture the ſaid Manor unto one** George Stidolphe **from the Annunciation then paſt for the Term of 51 Years then next following; then he entered** ante præd. tempus quo, **and was, and is yet thereof poſſeſſed, the Reverſion to the ſaid Dean and Canons expectant.**

Cr. Jac. 176.

The Avowant confeſſeth the Leaſe to Stidolphe; **but ſaith, that by the ſaid Leaſe all Leets, Lawdays, and Courts there to be held, and all Manner of Fines, Heriots, Reliefs, Eſcheats, Perquiſites and Profits of Courts were excepted and reſerved, and that** Stidolphe **being ſo poſſeſſed did the** 10 of Octob. 11 Jac. **Grant all his Eſtate to one** Butts, **that** Butts **the** 26 of March, 12 Jac. **by his Deed ſhewed forth did Grant all Leets, Lawdays, Courts, &c. unto the Dean and Canons. And that they afterwards held the Courts, and the Defaults of Suits** ut ſupr. **And that** Goldſmith **did Diſtrain for the Suit.**

2 Cr. 176. Dy. 45, 97.

The Plaintiff Demurrs for Doubleneſs, and ſheweth for Cauſe, in that the Defendant ſaith, the Courts be excepted, and alſo that the Courts be ſurrendred.

In this Caſe Judgment was given for the Plaintiff.

Poſt. 170. 1 Kebl. 810. p. 84. Dy. 288. b.

Firſt, it was agreed by us all, that the Exception (in the Original Leaſe) of the Courts, &c. was utterly void, becauſe the Manor by that Name was granted which might not be recalled; and Manor it could not be without a Court, only in the King's Caſe it was otherwiſe. And by the ſame Reaſon the Surrender of the Courts was Void, which were inſeparable from the Manor, ſcil. **the Court Baron. But then it was inſiſted upon, that the Plea was Void, and not Pleadable by him being a meer Stranger, for it was ſaid, that this was a Suit Service done from** Parſons, **the very Tenant,**

1 Inſt. 161.

and for Default of Suit of Parſons **he did Diſtrain. Now the Plaintiff conveyed himſelf no Intereſt to the Tenancy, but only as a meer Stranger did intitle another to the Service, which by the Books he cannot do, but plead only** hors de ſon fee. **To this it was anſwered and reſolved by the Court, that this Exception was true at Common Law, all Avowries for Service were to be made upon the Perſon of the Tenant.**

And it is true if the Lord will hold the Courſe of the Common Law in Avowing ſo: For his Choice remains unto him ſtill to avow as at the Common Law: But if he will leave that Way, and take the Benefit of the Statute to avow as upon Land liable to his Diſtreſs (as here he hath done) and ſo handle it as a Rent-charge, then the Stat. is Indifferent to both, that the other may Defend according to the ſame Rules, by the ſame Reaſon, for now the Privity of the Perſon Tenant is removed on both Sides, and the Charge of the Land is only in Queſtion.

Legem feras quam ipſe tuleris, **yet it is true, there is no literal Proviſion for this in the Law of** 21 H. 8. **but the meer Conſequence of Reaſon changing changes the Law.**

Now where the Avowing was only upon the Land, as in the Caſe of Cuſtomary Profits, as a Fine for Alienation or of a Rent-charge, there the Plaintiff

Plaintiff at the Common Law in ſuch Caſes might plead any Diſcharge though he were a meer Stranger, and had nothing in the Land. See 14 H. 4. 8. b. and 14 H. 8. 6. Halfpenies Caſes judged.

(132) The King and the Lord Hunſdon *againſt* the Counteſs Dowager of Arundel, and the Lord William Howard. Chancery.

IN Chancery there was a Suit commenced by me, as Attorney General, in the Behalf of the King's Majeſty, and the Lord Hunſdon as the King's Farmer for the Manor of Weſt Harſley and Aſalby in the County of York, againſt the Counteſs Dowager of Arundel, and the Lord William Howard and his Lady; which Cauſe coming to Hearing after I was Chief Juſtice of the Common Pleas, my Lord Chancellor called to his Aſſiſtance in the hearing of it, the Lord Chief Juſtice Coke and my ſelf. This Cauſe hung long, and had many Hearings and Briefs delivered, and after long Conſideration was this Term, with uniform Conſent of the Lord Chancellor, us the Judges, and Maſter of the Rolls, decreed for the King: Wherefore the Decree is, with the Reaſons thereof, adviſedly and exactly penned and entred, as of this Trinity Term 14 Jac. Mo. 823.

Of this Decree therefore at large I will ſay nothing but this, that the Reaſon of the Suit in Chancery was not for Want of good Title at Law (for it laid and affirmed the King's Title to be meerly by Law, by the Attainder of Francis Dacres, whoſe Land the Bill laid the Land to be, of an Eſtate in Tail) but the Cauſe of Suit was made, that the Deeds whereby the Eſtate was to come to Francis Dacres were not Extant, but very vehemently Suſpicious to have been ſuppreſſed and with-holden by ſome under whom the Defendants claimed, and therefore in the End the Decree ran, that the King and his Heirs, and his ſaid Farmer, ſhould hold and enjoy the Land 'till the Defendans ſhould produce the Deeds, and the Court thereupon take further Conſideration and Order. Chancery relieveth meer Titles in Law where the Deeds are not extant.

But two Points fell out in this Caſe very worthy the Obſervation. Two Points.

The firſt ſhortly thus, Anno 35 H. 8. there was great Controverſie between William Lord Dacres and his Children on the one Part, and the Heirs general of Sir James Strangways, for the Lands of the ſame Strangways. Whereupon in June 35. H. 8. the King made an Award between them, which Award becauſe it could not ſtate the Lands accordingly, afterwards in March, 35 H. 8. an Act of Parliament was made for Ratification of the King's Award, which was extant in the Rolls of Parliament, and now was certified under the great Seal of England. First Point.

The Exception to diſannul this Act of Parliament was thus: The Bill paſſed firſt in the Upper Houſe, by the Conſent of the Lords, which was ſent down into the Lower Houſe, and from thence was returned with this Indorſement or Superſcription on the Body of the Bill, A ceſte Bille les Commons ſont aſſentus avec la proviſion annexe: But there is no Proviſion extant upon Record. But that very Bill with that Superſcription or Indorſement, and with the regal Aſſent, and without any Proviſo indeed is filed with the reſt of the Bills and the King's Aſſent unto it, and labelled with the reſt, whereunto the great Seal is ſet, as the Courſe is in Private Acts, which are not enrolled without ſpecial Suit, as General Acts are; for General Acts are always inrolled by the Clerk of the Parliament, and delivered over into the Chancery; which Inrollment in the Chancery makes them the Original Record (as it was reſolved in John Stub's Caſe) but in Private Acts the very Body of the firſt Bill filed and ſealed, as aforeſaid, and remaining with the Clerk of the Parliament, is the Original Record.

The principal Caſe ſtanding thus, the Defendants Counſel preſs the Journal Book of the Upper Houſe, for there was no Journal Book kept for the Lower Houſe 'till the Time of E. 6. Concerning this Bill which is thus in divers Parts: Quarto Martii prima vice lecta eſt billa concerning the King's Award for Controverſies between the Lord Dacres and the Heirs general of Sir James Strangways the younger, &c. Cui quidem billæ proceres aſſenſe unt.

Item

Item hodie miſſa eſt ad domum communem per Regium Attornatum & ſolicitat. Billa, &c. And after 18 Martii hodie allata eſt a domo communi Billa, &c. cum proviſione eidem annexa. quæ prima & ſecunda vice lecta eſt, hodie commiſſa eſt Regio Attornato Billa, &c. And after 28 Mart. remiſſa eſt in domum communem per Attornatum Regium Billa, &c. hodie cum procerum conſenſu & aſſenſu cancellata eſt proviſio pro hæredibus maſculis Jac. Strangways mil. Billæ cuidam cui titulus eſt, &c. See theſe three Acts, the Sending of it to the Lower Houſe, the Bringing it from thence, and the Cancelling of the Proviſo, all on this one Day 18 Mar. upon which they infer, that the Commons being aſſented with Proviſion, had not aſſented to this Act without Proviſion, the ſame being cancelled by the Lords, of their own Heads. And ſo it is not an Act of Both Houſes, as it ought to be.

But it is clearly reſolved by us all, that this Exception was of no Value, and conſider it firſt by the Act it ſelf without the Journal, next by the Journal.

The Act it ſelf hath no Mention of a Proviſo, but in the Indorſement as before, wherein what the Proviſo was (if any were) appears not. Why then if there were indeed no Proviſo, the Aſſent of the Lower Houſe was Abſolute and Perfect; for the Referring of it ſelf to that, that was not, hurts not, and the Mentioning of it doth not prove neceſſarily that there was ſuch a Proviſo, no more, but rather leſs than in the Earl of Leiceſter's Caſe, Plo. 390. the Mention and Recital of his Attainder did convince the Truth of it.

If there were a Proviſo, yet it might be ſundry ways ſalvable, though it be not extant, for firſt, if it were loſt by the Fault of Negligence of the Keeper or Clerk of the Parliament, that muſt not avoid the whole Act. But ſuppoſe that a Proviſo were cancelled by the Lords only, yet it might be ſuch a Piece by it ſelf, as this Act that remains might be Perfect and Compleat without it.

And that three Ways ſpecially:

1. Becauſe it might be as a Part by it ſelf of a ſeveral Effect from the reſt of the Act, though all were not in one Chapter or Continent of the Act, as it is reſolved in Dive and Manningham's Caſe, Plo. 6. 5. upon the Stat. 23 H. 6. of Sheriffs.

2. It might be a Proviſo meerly Idle, Eluſory, or as it is termed Flattering, Plo. 564. in the Caſe of Unton upon the Statute of Wills, and the Duke of Norfolk's Attainder.

3. Thirdly, the Matter intended by this Proviſo might be ſo ſufficiently provided for by the Act it ſelf before, as this were meer Surpluſage, and then the Omiſſion of it could not Prejudice. And to that Opinion inclines 33 H. 6. 17. And that may ſeem to be the Truth of this, for the Proviſo ſeems to have been only to preſerve the Right of the Heirs Males of Strangways, whereas there was a general Saving in the Act as it came from the Lords, which ſerved them as well as others, and that perhaps might be informed to the Lower Houſe by the King's Attorney the 28 of March, when he carried it to them, as is ſaid; which might be the Reaſon of the Cancelling of it.

So this is the State of this Act, as it appears any way in the Record; out of which nothing can be inforced to annihilate the Act. And it doth not appear that the Lords did Cancel the Proviſo, but that it was cancelled the 28 Day with their Conſent, which 28 Day it was in the Commons Houſe, and brought from thence ut ſuper, ſo it might be cancelled there, and the Lords after Conſent to it. And all true and proper. And note, that there is a Journal of that Time of the Houſe of Commons, and the Lords enter not in their Journal the Acts of the Commons. Then take the Journal, it hath no Mention of the Effect of the Proviſo, but in one Place, and that is only by way of a Sum, not of a Full and Formal Sentence. For if the Proviſo were indeed in no other Form, than is mentioned proviſo pro hæredibus maſculis, &c. it were Senſeleſs and Void, and no Man may divine what it was to the avoiding of an Act otherwiſe Perfect. But now ſuppoſe that the Journal were every way Full and Perfect, yet it hath no Power to ſatisfie, deſtroy or weaken the Act, which being a high Record muſt be tried only by it ſelf Teſte meipſo. Now Journals are no Records, but Remembrances for Forms of Proceedings to the Record, they are not of Neceſſity, neither have they always been: They are like the Dockets of the

the Prothonotaries, or the Particular to the King's Patents. Co. lib. 2. 34. b. and 16 Eliz 331. of the Particular. The laſt intended Parliament 10 Jac. if you be judged by the Journal, it was a large and well occupied Parliament, yet becauſe no Act paſſed, nor Record is of it, it was reſolved by all the Judges to be no Parliament. Ant. 78. 1 Ro. 29. p. 1. Hutt. 61.

The Journal is of good uſe for the Obſervation of the Generalty and Materialty of Proceedings and Deliberations as to the three readings of any Bill, the Intercourſes between the two Houſes, and the like, but when the Act is paſſed, the Journal is expired. And in this Journal there appears but one Reading of the Bill in the Upper Houſe where it paſſed, which is unlikely. But if the Record of the Act it ſelf carry its Deaths Wound in it ſelf, then it is true that the Parchment, no nor the Great Seal, either to the Original Act, or to the Exemplification of it will not ſerve, as in the 4 H. 7. 18. where the Act was by the King with the Conſent of the Lords (omitting the Commons) and was judged therefore Void. And he that obſerves the Caſe 33 H. 9, 17. which was the only Caſe relied upon by the Defendant's Counſel, ſhall find it ſo; and upon this Rule the Doubt to be conceived, ſcil. upon the Parliament Roll it ſelf, not upon the Journal.

For the Caſe was, that Sir John Pilkington being charged with a Rape, an Act of Parliament paſſed, that he ſhould be proclaimed, and if he appeared not at the Day, he ſhould be attainted of the Fact, and pay a Fine to the Party grieved. Now being taken and brought into the King's Bench, he alledged that the Act (whereof Tranſcript was ſent by Mittimus out of the Chancery into the King's Bench) was not a Sufficient Act of Parliament in Law, for the Act began with the Commons and there paſſed, and was indorſed ſcit haile aux ſeignieurs; but where the Bill was, that Sir John Pilkington ſhould anſwer before Penteceſt next, the Lords indorſed the Bill thus.

The Lords granted or aſſented that he ſhould Anſwer before Penteceſt 1452. which was the Penteceſt Twelve Month. For the Penteceſt next enſuing, taking this Bill to Paſs as of the firſt Day of the Parliament, did incur ſitting the Parliament, for the Parliament begun before Penteceſt 1451. and the Lords gave Penteceſt 1452. and ſo ſaid the Defendant, there theſe two differing, the Bill ſhould have been returned to the Commons to allow or not. Now Priſot and Markham ask'd if the Bill came into the Houſe after the Penteceſt that incurred during the Parliament, as conceiving that then Penteceſt next enſuing mentioned in the Bill of Commons, ſhould not have been in Law that Penteceſt, but the ſame the Lords made a Year after, and ſo needed no Return to the Commons for a new Conſent, but if è converſo, then otherwiſe. But that by later Judgments is clear, that all Bills take Effect and work from the Beginning of the Parliament or Seſſion, except it be otherwiſe ordained by the Act it ſelf. But in this Caſe it is Plain, that the Difference appeared in the Body of the Roll of Parliament, not by a Journal Book. And the very Certainty of the Difference appeared alſo in the Roll, which appears not ſo much as in the Journal in this our Caſe. 1 Cro. 424. Poſt. 222. Yelv. 127. Plo. 79. b. Dy. 74. b. 95. a. 511. a

And yet Forteſcue Chief Juſtice of the King's Bench, after all done reſolved in that Caſe, 33 H. 6. 17. that it was an Act of Parliament, and they would be well adviſed before they annulled an Act of Parliament, peradventure it were beſt to refer it to the next Parliament.

The other great Point reſolved in this preſent Caſe was, that whereas this Title between the King in the Right of Francis Dacres ſtood partly upon the ſaid Act of parliament, and Partly upon a Feoffment made by William Lord Dacres, Anno 4 and 5 Phil. & Mar. and a Re-infeoffment back again, whereby the State was to grow to Francis Dacres, which Feoffment the Defendants ſaid was not Lawfully executed, and that Point had been examined before the Council at York, in the eighth Year of the late Queen Elizabeth; the Defendants required the Uſe of the ſaid Depoſitions, which the King's Counſel contended ought not to be granted unto them, and ſo the whole Court reſolved for divers Reaſons contained Particularly, and at Large in the Decree; which were theſe. The other great Point.

Becauſe

1. Depositions without Bill and Answer. Because the Suit was by English Bill in the very Nature of a Replevin to try the Title of Freehold of a whole Barony in Effect, without any Mixture of Equity at all.

2. Because it was between Strangers to the Remainder of Francis Dacres, by which the King Claims, for there was three Sons of William Dacres stated before it could come to Francis.

3. Because the Point put in Issue was an Estate Tail, supposed by Thomas Lord Dacre (the Eldest Son of William Lord Dacre then Dead) in the Time of H. 6. whereby he pretended the Feoffment should be as by a Remitter avoided, so the Feoffment was not denied but admitted, and yet the Tail was not a whit examined nor proved, but all bent to destroy the Feoffment, so that it was said, that those Depositions smelt of Practice, and upon Motion ought to be suppressed, and therefore ought not here to be allowed.

4. Because the Originals of those Depositions at York were all gone, and there were also no Exemplifications of them but in the Hands of the Defendants, so that the King must fight with Weapons assigned him by Parties Adversary.

5. That this very Point had been by the late Queens Commandment very carefully examined in Chancery 28 Eliz. only upon Petition, without Bill and Answer, between Francis Dacres the Petitioner, and the Earl of Arundel and his Countess, and the Lord William Howard and his Lady Defendants, as they are now, wherein all the Interrogatories were appointed to be perused by the Chief Justice, and the Examinations made not by the Examiner, but by certain Doctors of Law. At which Time divers of these Witnesses that had been examined 8 Eliz. were examined.

6. Those Depositions were little questioned by the Defendants Counsel, but were clearly allowed and read by the Court, though they were without Bill and Answer, for they were by special Direction in that Cause for Expedition.

7. They were with such Careful Proceedings and Reverend Persons as before.

8. They were by Consent of Parties, and the then Defendants examined very many Witnesses therein. But out of this Curiosity it was inforced, that the other Depositions taken, no Man knows how, were then either not known, or not regarded, nor ought now to be allowed.

9. Depositions taken in the Court of the Council at York in Case of Freehold refused in Chancery. But the the great and main Reason that they were not allowed to be read here was, because the Court where they were taken was not holden competent, in a Case of this Nature, and for Depositions to be read in other Courts.

And we all held it Dangerous to give a Precedent in this Court with such Assistance, and in such a Case. And though it did not appear whether their Instructions then bare it, yet the Reformations of late prove, that it was not allowable.

And though it were said, that those Depositions were allowed and given in Evidence by the Lord Coke, then Attorney General, in 36 Eliz. upon an Office at Carlile, taken before my Lord Chancellor, then Master of the Rolls, upon the Attainder of Francis Dacres, which was also confirmed by my Lord Coke: yet that moved us little, both because the Case differs much between an Inquest of Office which admits a Traverse, and this Hearing which is Final. And also because it is now contradicted and put to the Judgment of the Court, which must give Answer Judicially, which before passed in Silence.

Trespass. (133) Tasker *versus* Salter. H. 13 Jac. Rot. 2311.

Verdict against Law, whether it can save by the Statute. Moor f. 867. 32 H. 8. cap. 30. TAsker brought an Action of Trespass of Battery against Salter, the Defendant made Justification by conveying himself an Estate by Copy, in a Piece of Ground, Parcel of the Manor of Church-house, whereof Master Dean was seised, and the Plaintiff came upon it, and he laid his Hands molliter, &c.

4 Co. 30. b. The Plaintiff replied and conveyed himself also an Estate by Copy of another Piece or Parcel of the same Manor, and then laid that the same Master Dean, &c. Lord of the said Manor, had had for him and his Tenants of this

this Piece of Ground, a Way over the Defendant's Piece, &c. And thereupon Iſſue taken and found for the Plaintiff.

And the better Opinion of the Court was, that this was not holden by the Statute, becauſe indeed this was no Iſſue at all, nor thing nor poſſible iſſuable, and therefore the Verdict muſt alſo be utterly void; for a Verdict cannot make that Good, that the Court ſees cannot be in Law, ſo that this is the Office of the Court to Judge. But Payment pleaded to a ſingle Obligation, though it be not a ſufficient Bar, yet it may be both in Fact and in Law. 2 Cr. 435. 5 Co. 43. a. 2 Cr. 86, 377.

And though it were ſaid, that the Subſtance of the Iſſue was no Way. And if it had been laid in the Iſſue by way of Cuſtom, the ſame Evidence would have maintained it. So it was not but an Error in Form.

To which I anſwered, that ſince it is put in Iſſue as before, ſo as it cannot ſtand in Law, their Verdict alſo is not to be taken againſt them, to make them Subject to an Attaint, if in another Senſe it be Falſe.

And I ſay, that if they had found a Special Verdict, that the Cuſtom had been for the Way,, as it ſhould have been pleaded. Et ſi, &c. the Court would not have given Judgment, as if the Iſſue had been found for the Plaintiff, for the ſpecial Matter of the Cuſtom did not bear the Iſſue, as it is taken upon a Preſcription void in Law. And ſo upon the Matter it is a Verdict without an Iſſue, and out of the Compaſs of the Iſſue. Ant. 55, 73. Contract, B. 19.

(134) Stukeley *verſus* Underhill. Replevin.

Richard Stukeley Plaintiff, and Thomas Underhill Defendant, En Replevin le Defendant, avow pur dammage feſant, le Plaintiff plead que il fuit ſeiſin in Fee d' un meſſ. & Terre d'un Acre, d'un autre meſſ. & terr. And that they two, and all thoſe whoſe Eſtate, &c. had Common of Feeding, &c. in the Place, and then Conveys to himſelf the other Houſe and Lands for Years, and then juſtifies the putting in of the Beaſts, le Defendant traverſeth the Preſcription, and found for the Plaintiff. Verdict upon an Iſſue confuſed. *Quære*, if this Land had been upon Demurrer general.

And though this Preſcription thus confuſed for ſeveral was groſly Faulty, yet the Verdict did ſalve it by the Stat. This was this Trinity Term.

(135) Kent *and* Hall. Obligation.

Between Kent and Hall, Mich. 42 & 43 Eliz. Rot. 908. in Debt upon an Obligation upon Condition to pay Ten Pounds Ten Shillings; the Defendant Pleads Payment of Ten Pounds ſecundum formam conditionis, ſurque iſſue, and Verdict for the Plaintiff, and yet Repleader was awarded. See a like in Quare Impedit between Danby and the Archbiſhop of York, Hill. 7 Jac. Regis Rot. 901, & 902. Iſſue not joined aright. 1 Roll. 204. 3 Cr. 586. 1 Cr. 593. 5 Co. 43. a.

Juſtice Warburton reported a Caſe of one Armſey's, when Dower was brought againſt the Feoffee of the Husband, who pleaded Detinue of Charters, which is no Plea but for the Heir; whereupon Iſſue was taken, and the Verdict for the Defendant, and Judgment given for the Defendant, and Error brought upon it, but he could not tell what became of it. Iſſue Inſufficient. Ant. 69. Poſt. 320. 3 Cr. 367. Mo. 867.

After Verdict it was moved, that the Habeas Corpus was returned Barthol. Miles, Vic. & Michael, which was the Sheriff's Sirname omitted. And it was amended by Rule. Yelv. 110. 1 Cr. 528. Noy. 72. Amendment by putting the Sheriffs Sirname to a Return. Poſt. 130. 2 Cro. 445 1 Ro. 295.

(136) Don Diego Servienti de Acuna, *the* Spaniſh Embaſſador, *againſt* Sir Richard Bingley. Chancery.

Don Diego Servienti de Acuna the Spaniſh Embaſſador, exhibited his Bill in Chancery againſt Sir Richard Bingley, upon the Caſe ſupra, as Procurator general for all the King of Spain's Subjects, and laid the Goods to belong to the Subjects of his Maſter generally, without naming any Perſons certain, and then laid the Spoil at Sea there, &c. Ant. 78. Saund. 2. 260. con. Ant. 11.

The Defendant demurred upon the Bill, and it was referred to my Brother Nichols and my self, scil. the Demurrer by my Lord Chancellor, we heard Serjeant Mountague for the Embassador, and Serjeant Crew and Hutton for the Defendant; and we were of Opinion, that the Embassador was not to be answered to this Bill, for (to omit, that a Procurator ought to sue in the Name of his Principal) no Man can make a Procurator for me but my self; therefore the King cannot make a Procurator for all, or any of his Subjects, without their Allowance; that is, for the Part of the Plaintiff. Again on the Part of the Defendant, the Embassador neither by Release nor Sentence can Discharge him against the Principal, from whom he hath no Procuration. Again, the Office of an Embassador doth not include a Procuration Private, but Publick for the King, nor for any several Subject, therwise than as it concerns the King and his Publick Ministers to protect them, and procure their Protection in Foreign Kingdoms, in the Nature of an Office and Negotiation of State; and therefore they may and ought to Mediate, Prosecute, and Defend for them, or any one of them at the Council Table, which is as it were a Court of State. But when they come to settled Courts, which do and must observe Essential Forms of Proceedings, scil. processus legitimos, then they must be ruled by them, and not confound all Rules; except some Precedents could be found in Chancery.

Embassador, how he may deal as a Procurator, or not.

But we made Report, because we advised another Course, whereunto both Parties consented. And we the Judges of the Common Pleas, where this Cause depended, by Prohibition appointed a Suit by Consent in Chancery, only to Examine Witnesses, and then we to determine the Cause, as Judges of our own Court Arbitrally, not by Warrant of any Order of Chancery.

And so large a Bill being founded only upon our Order and Consent of Parties, we made a Final Order, whereof the Main was, that 200 Pounds was to be paid to the Embassador, he giving Security of a much greater Sum (because the Embassador had made a high Estimate; and indeed the Goods (not allowing just Defalcations of Spoils, Salvage and other things) was 2600 Pounds, or 2700 Pounds) to secure the Defendant against all Proprietaries, and other Claims. Vide supra.

Star-chamber. (137) Bradshaw *and* Salmon. Covenant.

Breviats to Juries. Vaugh. 125, 152.

IN the Star-chamber between Bradshaw and Salmon in an Action of Covenant, the same Salmon had upon the Trial delivered Breviates to the Jury, by Means whereof 200 Marks Damages were given against Bradshaw. Now the Plaintiff, when it appeared that there was no Cause of Damage in Effect, but only somewhat must be given, because the Issue by not pleading the Truth in Form was passed against him, and though the Plaintiff in this Case had an Ordinary Remedy in Law, by Attaint for Excessive Damages; yet for the Difficulty of Proceeding in Attaint, the Court gave him 160 Pounds Damages here: Note, that the Jury were not Defendants, which yet they might have been here in respect of the Briefs received. But I hold, that a Bill against them only for giving of Excessive Damages could not lie.

Bill cannot lie against a Jury for giving Excessive Damages.

Anonymus. Star-chamber admits no Foreign Depositions directly nor indirectly.

In a Suit in the Star-chamber, Witnesses were examined to prove what was deposed concerning a Will in the Ecclesiastical Court: But because Depositions are not allowed in Star-chamber taken in other Courts, they were rejected as a Crafty Device to induce Depositions against the Rule.

Hoskins

(138) Hoskins Case.

HOskins sued in the Ecclesiastical Court for all the Tithes of the Ground of one Eve, who prayed a Prohibition upon Surmise, that the Queen was seised of two Parts of the Tithes, and had granted them to one Weston, and so conveys them to another, to whom he had paid those two Parts. Now the Parson by Serjeant Harris, prayed Consultation for the third Part; but it was denied him, because his Consultation cannot be granted but according to his Libel. Therefore he must Libel for the third part de novo; Quære, if he might not have had a Consultation as to the third Part only.

Consultation according to the Libel. Yel. 55. post. 192, 301. 5 Co. 67. b.

(139) Sir Thomas Sherley's Case.

SIr Thomas Sherley being under Protection, was brought by Habeas Corpus to the Common Pleas Bar by one, who desired to have him charged in Execution, by Reason of a Cap. utlagatum after Judgment for his Debt. But it was answered by my self, and the Court agreed it, that because the Capias utlagatum was the King's Suit, and for the Subject, but in the second Degree, the King might discharge his own Suit. If any Act had been done by the King to frustrate the Outlawry, this was so; but a Protection will hardly do it, especially not being delivered or made known to the Coroners. Now then the Party is not in Execution for the Party, though he make his Election after, specially as this Case was, being after the Year.

Habeas Corpus Cap. utlegat.

Yelv. 19. q' e' per l' subject chise lii. Protection for the King's Debtor. 3 Cro. 909.

But it was said, that though the King's Debtor now in Execution, by his Body or his Lands for the King, yet the Subject might also lay or take him in Execution by his Body. For the Statute 25 E. cap. 19. (where it says, the Subjects Execution shall cease 'till the King be satisfied) is understood of such Executions whereby the King may be prejudiced, scil. Lands or Goods. But the Body is all to all.

1 Cro. 390. 2 Ro. 158, 302. Dy. 197. p. 44. 297. p. 24. Co. L. 131. b. 3 Cr. 164. N. B 28. B. Cr. Jac. 477. Dy. 60. a. b. 140. a.

(140) Glanvile & Allen's Case.

Star-chamber.

IN the great Cause of Glanvile and Allen Defendants, in this Star-chamber at the Suit of the King's Attorney for offering Indictments in the King's Bench upon Proceedings in Chancery after Judgment and some indirect Dealings in that Case; they answered, but refused to answer Interr. And upon Motion it was resolved by the Court, that the Bill could not in this Case be taken pro confesso, because it was answered, and denied by the Answer. And therefore it was ordered, that they should be put in Irons, and so more and more clogged 'till they answered. Yet I then doubted, for I conceive that the answering upon Interr. was the more perfect Answer; that being his own, the other as it were his Counsels. So that I counted the Answer not finished 'till the Interr. were also answered by Reason of the Course of that Court.

Bill answered and Interr. refused, cannot be taken *pro Confesso*.

(141) Flower's Case.

Star-chamber.

ONe Blanche Flower brought a Title thus: That if he could recover it he should pay 200 Pounds, otherwise nothing. And now he was sued in the Star-chamber for the Buying, and Maintenance of Suits after; the Buying was laid upon the Statute of 32 H. 8. but out of Time, scil. after the Year. So for that Part he could not be questioned.

Ro. 2. Abr. 114. Champerty, B. 7. Maintenance of a Title brought, but nothing to be paid without he recovered.

The Maintenance the Defendant's Counsel said was lawful, because he had taken the State of the Land, so he maintained his own Cause, yet he was sentenced for that Point. For it was said, that 'till he had recovered it was not in Effect and Truth his, because he was to pay nothing if he recovered not. And it was not meant unto him to be given him freely. So all the while he maintained the Title at the Peril of the Owner. Besides,

this being a meer Device and Fraud, and practiced by a Solicitor to transfer to himself another Man's Title to follow, upon a Casual Match was to be met withal in Time.

Quære, if this will lie upon the Statutes at the Common Law-Courts.

Habeas Corpus.

(142) Wickſtead *verſus* Bradſhaw.
P. 14 Jac. Rot. 2178.

Bail cannot render the Body of the Defendant in the Common Pleas after Writ of Error brought by him. 2 Ro. 491. 1 Brnl. 63. 1 Ro. 334. Br. Error, 55. Noy. 11. Mo. 850. Cr. Jac. 109.

Wickſtead recovered againſt Bradſhaw 60 Pounds Debt, and 46 Shillings 8 Pence Damages, and now this Term Bradſhaw was brought to the Bar by a Habeas Corpus procured by his Bail, with Purpoſe to ſave themſelves. And ſo both the Plaintiff prayed that he might be committed in Execution, and alſo the Bail, that he might be received in their Diſcharge. But it appeared to the Court, that Bradſhaw had already brought a Writ of Error which was allowed by me, and the Return of it not yet come; ſo that the Court was diſabled either to award Execution, or to put him in Execution. And this alſo was the Cauſe that the Bail could not be diſcharged; for the End of the Bail is not only to bring the Body, but that he come Subject to the Court according to the Meaning of the Bail, which cannot be in this Caſe, becauſe of the Writ of Error, for the Entry in Diſcharge of the Bail muſt be, that the Defendant reddidit ſe to the Court to be in Execution, if the Plaintiff will, which cannot be ſo here. And Quære, whether this hath not ſo diſabled this Defendant by his own Act, that the Bail is forfeited (note, the Bail have not diſabled themſelves) though afterwards he proceeded not in his Writ of Error. And ſo Execution may be taken here.

But note, that afterwards this Term Bradſhaw the Defendant was brought again to the Bar by another Habeas Corpus, and the Plaintiff prayed him in Execution; which was granted, becauſe the Day of the Return of the Writ of Error was paſſed, and he had not cauſed the Record to be removed, and therefore this Court was re-enabled to award Execution.

Dy. 245. a.

Obiligation. London.

(143) Walter *verſus* Piggot.
Tr. 44 Eliz. Rot. 1031.

Septuagint, for Septingent. 2 Cro. 147, 190. 2 Ro. 147. 3 Cr. 896. Ant. 18, 19, 20, 75. 3 Cro. 896. 9 H. 6. 7. 10 Co. 133. a. Moor 1. 645. Yel. 96. Styl. 257. Poſt. 119.

William Walter brought an Action of Debt againſt Thomas Piggot, and declared, that the Defendant ſtood bound to him in ſeptingent. & quinquagint. libris, and produced his Writing Obligatory, upon Oyer whereof the Words were, ſeptuagint. & quinquagint. libris. Whereupon the Defendant pleaded the Variance, and thereupon a Demurrer, and adjudged for the Plaintiff, that it was no Cauſe to abate the Writ. And the Defendant put to further Anſwer, who pleaded non eſt factum. And the Jury found, that the aforeſaid Writing Obligatory de ſumma ſeptuagint. & quinquaginta librarum per quod prædictus Willielmus Walter per bre. ſuum exegit de præfat. Tho. Piggot infra-ſcript. ſeptingent. & quinquaginta libras was ſealed and delivered by Piggot to Walter as his Deed; ſed utrum ſuper tota materia, &c. And thereupon the Court adjudged, the Plaintiff ſhould recover the 750 Pounds demanded, and Damages and Coſts. Note, there was nothing either pleaded by the Party, or found by the Jury, that it was Meant for 700 Pounds; upon this Judgment a Writ of Error was brought, but it appears not what was done upon it.

(144) Blackford *verſus* Alkin. Treſpaſs.
Trin. 14 Jac. Rot. 2376.

1 Brnl. 235.

Thomas Blackford brought an Action of Treſpaſs againſt John Alkin for taking his Horſe. The Defendant pleaded, that one John Holt was ſeiſed in Fee, and ſo ſeiſed, granted a Rent of 4 l. per Annum to John Alkin with Clauſe of Diſtreſs, and Conveys the Rent to the Defendant, and for 40 s. he diſtrained.

The Plaintiff replied, that long before the the Grant ſuppoſed William Holt was ſeiſed, and had Iſſue John Holt the Elder, and John Holt the Younger,

younger, that he deviſed his Land to his ſaid two Sons in Tail, and died. That John the Eldeſt died without Iſſue, and that John the Younger had Iſſue A. and died, and that A. gave Licenſe to the Plaintiff to put in his Horſe, abſque hoc quod præd. Johannes Holt pater fuit ſeiſitus in domino ſuo ut de feodo, prout. Sur que, Iſſue, and found for the Plaintiff. And it was ſaid in Arreſt of Judgment, that there was no Iſſue, for it was not pleaded, that John Holt Pater was ſeiſed in Fee as the Traverſe was. But yet Judgment was given for the Plaintiff; for though Pater be added, yet præd. Johannes Holt prout the Defendant alledged, binds it to that Perſon that the Defendant had pleaded, and that Pater is but John, and can do no Hurt, eſpecially ſince it may ſtand true that he was Pater, as if it had been traverſed abſque hoc quod præd. Johannes Holt generoſus, &c. otherwiſe it had been abſque hoc ad præd. Willielmus Holt, which could not be taken for the ſame Perſon; yet perhaps that might have been amended, though hardly.

2 Cro. 67, 502, 589. Yel. 65. 1 Cro. 80, 93. 3 Cr. 455.

(145) Box *verſus* Barnaby. Caſe.

BOx an Attorney brought an Action upon the Caſe againſt Barnaby for theſe Words; Thou art a Common Maintainer of Suits, and a Champertor, and I will have thee thrown over the Bar the next Term. And after a Verdict for the Plaintiff, upon a Motion in Arreſt of Judgment, the Court gave Judgment for the Plaintiff only upon the Word Champertor, for their is Maintenance Lawful and Unlawful, and where the Word is Indifferent it ſhall be taken in mitiorem partem; now an Attorney may and ought by his Office to maintain his Clients Cauſes. And yet in an Action of Maintenance he cannot plead not Guilty, but muſt Juſtifie. And an Attorney may well be ſaid a Common Maintainer, becauſe he is Common to as many as will retain him. And the Words of throwing over the Bar are utterly of an uncertain Senſe; but indeed it is a Slander to an Attorney, and that in his Vocation of Attorney to be a Champertor, for that is not only beyond but againſt his Office. And therefore 20 or 21 E. 1. Raſtal. Tit. Champerty 3. that Pleaders and Attorneys take Pleas to Champerty. And I hold, that if an Attorney follow a Cauſe to be paid in Groſs, when it is recovered, that is Champerty.

Attorney is called a Champertor. 1 Roll. 43. Poſt. 268. 1 Brnl. 15. Champerty, B. 3. Ant. 62, 115. V. in *Brownlow*'s Reports, 15. the ſame Caſe adjudged as here. Moor 867.

1 Cro. 192, 229.

But when it is objected, that the Word [Champertor] was a Word of Art not to be underſtood by the Vulgar, and ſo no damageable Slander, no more than Words in Latin or Welſh, except you ſay, that the Hearers underſtood it; it was reſolved, that this being Engliſh, and of a certain and ſingle Senſe, the Court cannot doubt but it was underſtood.

Poſt. 126, 191, 268.

(146) Napper *verſus* Jaſper & George.
Tr. 14 Jac.

IN an Action of Treſpaſs brought by Robert Napper againſt Charles Jaſper and Robert George; Iſſue was taken, that Richard Johnſon Prebendary of the Prebend of Preſton in the Church of Sarum, and all his Predeceſſors Prebendaries, &c. had uſed Time out of Mind to keep a Shepherd of certain Sheep of theirs, following the ſame Sheep for the better keeping of them, feeding together in a certain Paſture, from the Sheep of Thomas Earl of Suffolk in the ſame Place, and the Iſſue was found accordingly. And it was moved, that this was a void Verdict, for the Preſcription was Senſeleſs and could not ſtand, that the Sheep could be kept Time out of Mind from the Sheep of the Earl of Suffolk, being but one Man's Life. But yet Judgment was given according to the Verdict for the Plaintiff, for the Subſtance of the Iſſue was the keeping of the Sheep of the Prebendary feeding together, and the other Part was but a Conſequent of it, that thereby they were kept from the Sheep of the Earl.

Ant. 112.

Verdict ſeeming againſt Law and Senſe. 2 Cr. 67.

Brickhead

Quare Imped.

(147) Brickhead *verſus* Biſhop of York and Coke.

V. Caſe. Mo. 866. Hutt. 57.

IN a Quare Imped. between Brickhead Plaintiff, and the Archbiſhop of York and Coke Defendant, for the Vicarage of Leeds. After Demurrer joined, and one or two Arguments at the Bar, it was found in the Writ inſtead of Vicariam, Vaccariam. And ſo it was prayed to be amended, whereupon the Curſitor was called into the Court. And becauſe it appeared to the Court by his Book, that his Inſtructions were Vicariam, and he depoſed that the Tilting was delivered unto him accordingly, he was ordered to amend the Writ in open Court, and ſo did.

Amending an Original. 8 Co. 159. Cr. Car. 74. Poſt. 128, 184. 3 Cr. 119, 644. 1 And. 24. Noy. 73.

Prohibition.

(148) Shelton *verſus* Montague.
Hill. 13 Jac. Rot. 2072.

Diſmes Br. 11.

WIlliam Shelton Eſquire brought a Prohibition againſt Richard Montague, and declared, that where he holds and occupies, and by Ten Years laſt paſt held and occupied an Hundred Acres of Land, and Ten Acres of Wood, lying within the Bounds of the Pariſh of Stamford Rivers in Eſſex, within a Park there called Ungar Park, being Part of the ſaid Park, which extends it ſelf as well into the Pariſh of Ungar as Stamford Rivers. And whereas the ſaid William, and all the Occupiers of that Part of the ſame Park, that lies in Stamford Rivers, &c. Time out of Mind have payed, and uſed to pay to the Parſon of Stamford Rivers aforeſaid, &c. Yearly, &c. four Pounds in full Satisfaction and Diſcharge of all the Tithes of the ſaid Grounds; which four Pounds the Parſon had ſo accepted, whereupon Iſſue was taken and found for the Plaintiff. And now Montague moved in Arreſt of Judgment for two Cauſes: First, becauſe it was not laid that it was Parcus antiquus to bear Preſcription as the Caſe of Ilebrewers Park, 6 E. 6. Dyer; which was anſwered, that there the Preſcription was made for the Keeper, which requires a Park and Liberty. But here the Park was laid but as Land Generally. The ſecond Exception was, that the Preſcription was laid in Occupiers, and not in Owners nor by way of Cuſtom in the Place, which was reſolved and anſwered by the Court, that this was no Matter of Intereſt and Inheritance but in Point of Diſcharge, and therefore the Precedents were very Common in this Kind; and ſo 15, 16, and 18 E. 4. Inhabitants may Preſcribe for an Eaſment. And I ſaid, that the Preſcription in this Caſe did not ſo properly lie on the Part of the Pariſhioner; for no Man can Preſcribe to his own Charge only as to pay four Pounds per Annum, but it took Effect rather on the Part of the Parſon that received it.

Dy. 70. b. Ant. 44. 10 Co. 59. b.

Ant. 44.

Preſcription for a *Modus Decimandi*, which is in Occupiers. 2 Cro. 152, 665. 6 Co. 60. b. 59. b. 3 Cr. 445. Dy. 77. a. Cr. Car. 419.

But the Preſcription indeed amounts to this, that the Occupiers or Pariſhioners have been Time out of Mind diſcharged of all Tithes by Payment of four Pounds per Annum, for every Modus Decimandi is a Diſcharge of the Natural Tithe, and ſo works by way of Diſcharge, as it is reſolved in the Parſon of Pyekirk's Caſe, Dyer. 349. b.

Q. Imped.

(149) Dominus Rex *againſt* John Biſhop of Rocheſter, *and* Jackſon his Clerk.

A Quare Imped. was brought by the King againſt John Biſhop of Rocheſter and Edm. Jackſon his Clerk, and declared, that Queen Elizabeth was ſeiſed of the Advowſon of the Church of Milton by Graveſend in Gross, and preſented one Soan, who at her Preſentation was, &c. and now the Church is void by the Death of Soan, and it appertains to the King to preſent. The Biſhop and his Clerk plead, that before the Queen, &c. Edm. Biſhop of Rocheſter was ſeiſed of the ſaid Advowſon, and collated one John Jackſon, and then was removed to Norwich, and then in the Vacation Jackſon died, and the Queen preſented Soan; And now Soan being dead, it belongs to the now Biſhop, &c. who collated the ſaid Edmund Jackſon, who is Perſona

ſona imperſonata, &c. abſque hoc that the Queen was ſeiſed of the Advowſon, prout: And the Jury found, that the Advowſon in Fee was Preſentable by the Queen by two Turns contiguous. And by the Biſhop for the third Turn. And that the Queens firſt Turn was ſatisfied by the Preſentment of Soan, and that this is the ſecond for the King, and concluded, Si ſupra tota materia, the Court doth judge that the Queen was ſeiſed of the Advowſon aforeſaid, ut de uno groſſo per ſe ut de feodo & jure Then the Jury found ſo, if not then Contrary. And though this Verdict did not find the Iſſue for the King, for the Iſſue was to be underſtood of the whole Advowſon; yet becauſe it did clearly appear to the Court by the Verdict, and that not out of the Iſſue, that this Preſentation did of Right belong to the King, therefore the Court did Award a Writ to the Biſhop for the King, and to remove the Clerk of the Biſhop, and to this alſo the Biſhop aſſented, which was ſo entred in the Record of the Judgment. 2 Cr. 85. 2 Ro. 704.

(150) Parry *verſus* Dale. Obligation. Paſch. 4 Jac. Rott. 531. Cheq. London.

THomas Parry brought an Action of Debt againſt William Dale for 500 Pounds upon an Obligation dated the 16 of September, An. 41 Eliz. Dale the Defendant Demands Oyer of the Obligation, and it was read in theſe Words, Noverint univerſi per præſentes nos Richardum Oldſworth & Willielmum Dale, Cives & Groceros London, teneri & firmiter obligari Thomæ Parry generoſo, in quinquegintis libris legalis monetæ Angliæ ſolvend. and the Defendant after Oyer of the Condition pleaded an inſufficient Bar, whereupon Parry demurred, and yet Judgment was given againſt him, the whole Court conceiving that the Bond was naught, becauſe quinquegintis was no Latin Word at all. But the Cauſes coming by Writ of Error before the Judges in the Exchequer Chamber, 11 Jac. after many Debates and Precedents ſeen and peruſed Ter. Paſch. 14 Jac. the Cauſe was ended by the Mediation of the Judges, and 300 Pounds given by Order to Parry, and ſo general Releaſes from each to other. For my ſelf and moſt of the Judges were of Opinion, that the Bond was Good for 500 Pounds: But the Chief Baron ſtuck, being one of them that gave the Judgment in the King's Bench. 2 Cro. 146, 147, 203. Yelv. 95, 105. 2 Roll. 146. Ante. 18, 19. Styl. 257. Yel. 96. 10 Co. 133. a. Mo. 645. Obligation falſe Latin or no Latin in the Sums

(151) Wood *verſus* Budden. Treſpaſs. Paſch. 14 Jac.

WOod brought an Action of Treſpaſs againſt Budden, and declared in the new Aſſignment in a Cloſe of Paſture in Tollard Royal; the Defendant pleaded, that William Earl of Salisbury was ſeiſed as in Fee and Right of an Ancient Chaſe repleniſhed with Deer, called Cranborn, and ſo preſcribed in Liberty of Chaſe, and that the ſame Chaſe did extend it ſelf as well in and through the ſaid 8 Acres of Paſture, as in and through the ſaid Town of Tollard Royal, and juſtifies the Treſpaſs for Uſe of the Chaſe. The Plaintiff maintains his Declaration, and Traverſeth, that the Chaſe doth not extend it ſelf as well to the 8 Acres as to the whole Town. And this Iſſue was tried at the Bar, and found for the Plaintiff. And now it was ſaid in Arreſt of Judgment by Finch Serjeant, that this Iſſue and Verdict were Faulty, becauſe if the Chaſe did extend to the 8 Acres only, it was enough for the Defendant, and therefore the finding of the Jury, that it did not extend as well to the whole Town as to the 8 Acres, did not conclude againſt the Defendants Right in the 8 Acres, which was only in Queſtion. But it was anſwered by the Court, that there was no Fault in the Iſſue, much leſs in the Verdict (which was according to the Iſſue;) but the Fault was in the Defendants Plea that now takes the Exception, for he puts in his Plea more than he needed, ſcil. the whole Town, which being to his own Diſadvantage, and to the Advantage of the Plaintiff there was no Reaſon for him to Demur upon it, but rather to admit it as he did, and ſo to put it in Iſſue. And ſo Judgment was given for the Plaintiff. 2 Cro. 85, 183. 1 Cr. 7. Verdict upon Iſſue larger than is needful. Ant. 105. Dy. 365. b. 2 Cro. 184. 1 Cr. 6

Smales

(152) Smales *verſus* Dale. Ejectione.
Trin. 12 Jac. Rot. 2141.

Moor, f. 868. Winch E t. 443. Counterplea de Voucher, Br. 29.

JOhn Smales brought an Ejectione firme againſt William Dale of the Demiſe of John Berriman, and upon not Guilty the Jury found, that one William Watſon was ſeiſed of the Land in Queſtion, and had Iſſue Allen Watſon and Ann Watſon by one Wife, and William Watſon by another, and deviſed this Land, being holden in Knight's Service of the late Queen, unto his Wife during her Widowhood, the Remainder to William the Younger, and died, and that his Wife entred into all the Lands; and that Allen made no actual Entry into the Lands, but died without Iſſue, and then the Wife married, and William Watſon the younger Son entred and infeoffed the Defendant, upon whom the Plaintiff's Leſſor, being Son and Heir of Anne the Siſter of Allen entred, and made the Leaſe to the Plaintiff, who being actually ejected brought his Ejectione Firme of the whole Land. And it was adjudged for the Plaintiff, as to the third Part only which deſcended to Allen notwithſtanding the Demiſe; for it was reſolved, that the Wifes actual Entry did work to an actual Entry alſo to Allen the Heir for his third Part, whereof he was Tenant in Common with her, For it was ſaid, that the Entry of one Tenant in Common might be in three Manners, either in the Name of her ſelf, or her Fellow (which were moſt clear;) or Generally (as this Caſe is) which ſhall be always taken according to Right as being under Conſtruction of Law, and therefore ever conſtrued Lawful; or laſtly, Entry claiming all Expreſly, which yet cannot Diſpoſſeſs her Fellow, for her Poſſeſſion is over all Lawful as well before ſuch Claim as after, ſo that there is no Poſſeſſion altered by ſuch Claim, and then a ſole Claim without more can never Change the Poſſeſſion, and without a Change of Poſſeſſion it remains as before. And therefore a Co-partner, a Join-tenant, or Tenant in Common, can never be diſſeiſed by his Fellow, but by an actual Ouſter; and therefore in ſuch a Caſe, if a Tenant in Common bring an Action of Treſpaſs againſt a Stranger alone, his Action ſhall be abated by pleading him Tenant in Common with another, howſoever his Entry were made, which proves that the Entry of one ſerves for all, for elſe they could not join in an Action of Treſpaſs.

Entry by one Tenant in Common ſervices for all. 3 Keb. 90. p. 30. 7 H. 7. 9. b. 3 Cro. 641. Mo. 375. 1 Inſt. 14. a. Co. L. 243, b. 373, b. 374. a. Enqueſt, Br. 71. 3 Cr. 640. 1 Inſt. 379. b.

Mo. 59. Inſt. 199. b.

(153) Lord Darcy *of the* North *againſt* Gervaſe Markham.

Star-chamber.

THe Lord Darcy of the North ſued Gervaſe Markham Eſquire in the Star-chamber, and the Caſe fell out to be thus, that they had hunted together, and the Defendant and a Servant of the Plaintiff's, one Beckwith, fell together by the Ears in the Field, and Beckwith threw him down and was upon him cuffing of him, and the Lord Darcy took him off and reproved his Servant, and yet Markham chid him, charging him with maintaining his Man. And the Lord Darcy replied, that he had uſed him kindly, for if he had not reſcued him from his Man, he had beaten him to Rags. Whereupon Markham wrote five or ſix Letters to the Lord Darcy, and ſubſcribed them with his Name, but ſent them not, but diſperſed them unſealed in the Fields, whereof the Effect was, that whereas the Lord Darcy had ſaid, that but for him his Man Beckwith had beat him to Rags, he lied, and as often as he ſhould ſpeak it, he lied, and that he would maintain with his Life; and then ſaid, that he had diſperſed thoſe Letters that he might find them, or ſome Body elſe might bring them to him; and concluded, that if he were deſirous to ſpeak with him, that he ſhould ſend his Boy, and he ſhould be well uſed. This Cauſe was effectually handled at the Common Law, not enforced by the King's Proclamation, becauſe the Defendant had no Knowledge of the Proclamation, nor by likelihood could have, it was ſo ſoon after the Proclamation: But the Plaintiff's Counſel by Direction of the Court left the Proclamation, and yet Markham was cenſured and fined 500 Pounds; the Reaſon of the Sentence was, that this was a compounded Miſdemeanour, for the Letter thus diſperſed was in the Nature of a Libel,

Star-chamber puniſheth Provocation to a Challenge.

a Libel, Slanderous and Defamatory to my Lord Darcy; and the other Point was, that though there were no direct Challenge to my Lord Darcy to Fight, yet there were plain Provocations to it, and as it were to call and challenge my Lord Darcy to fight him. And though the Caſe was ſomething aggravated, that it was to a Peer of the Realm, yet the Cenſuring of the Fact roſe out of the Nature of it, and not out of the Circumſtance of the Perſon. And I in my Sentence ſaid, that the Law did not allow any Man to ſtrike in private Revenge of ill Words. And the Reaſon of the Wiſdom of the Law in that was, becauſe there was no Proportion between Words and Blows, but he that is ſtrucken may ſtrike again: But it is true, that there is a judicial Combat allowed before the Conſtable, if a Man be called Traytor, and in this Caſe for Matter of Satisfaction in Point of Honour (as it is called) that was left to the Lord Marſhal, as a diſtinct Court and Conſideration from this. In this Caſe in my Sentence, I ſaid, that thoſe inſolent Perſons take upon them to frame a Law and Commonwealth to themſelves, as if they had Power to caſt off the Yoke of Obedience to Peace and Juſtice. And therefore they Enact among themſelves as an undoubted Poſition, that a Man wronged may with his Sword in his Hand require Satisfaction of any Man, being no privy Counſellor, and with a Mild Word to qualifie the Deteſtation of this kind of Murther, they have made it a familiar Phraſe, that he was killed Fairly, and he was killed in equal Fight; which Arrogancy and Rebellion muſt be ſubdued by this Court, cenſuring the beſt. And by Judges and Jurors, who muſt not give any Way to this impious Diſtinction of Fair and Foul killing, but muſt execute the Law with Severity upon all Murtherers; for the Law knows no ſuch Diſtinction.

And this I vowed publickly to do, for I took it to be the only Remedy againſt this Damnable Preſumption.

This Sentence of mine it pleaſed the King much to approve, and it pleaſed him to ſay, that I did hit his own Mind in it. This was the laſt Day of December, 1616. when it pleaſed him to confer with his poor Servant of divers Things.

(154) Searle's Caſe.
2 Cro. 430. m' 2 Roll. 222. m'

ONe Searle Parſon of in Eſſex was tried before me, and found guilty of Manſlaughter, whereupon (Doctor Dunne Maſter of the Requeſts, being his Patron) he was queſtioned to Deprivation before Doctor Bird Judge of the Audience to the Lord Archbiſhop, where he deſired to be admitted to his Defence, that he was not Guilty, contrary to the Verdict: And Doctor Bird came to me for my Direction. And I (though I doubted not, yet) conferred, and we agreed, that Felony or other Capital Crimes were not Examinable in the Eccleſiaſtical Courts, no not for Purpoſes that were Examinable there, as in this Caſe of Deprivation; and therefore they may not Originally Examine ſuch a Crime to prove a Man criminous; much leſs, when he is ſo proved in the Proper Court, impeach the Sentence in a Court Improper. But they may build a Sentence of Deprivation upon ſuch a Conviction, and they are bound by it. And it is Dangerous for a Judge Eccleſiaſtical to come againſt it. Apres 288, 290. Accord.

Vide in *Crook* in p. 2. this Caſe is, and there it is reſolved, that no Prohibition lay in this Caſe: and it is there ſaid, that it is a Rule, not to grant a Prohibition where the Proceedings of the Eccleſiaſtical Court are not againſt the Law, and the Liberty of the Subject. Poſt. 288, 294.

(155) Simon Pits *verſus* Richard James, & alios.
Tr. 12 Jac. Rot. 2187.

Oxon.
Ejectione Firmæ.
Brownlow.

SImon Pits Gent. brought an Ejectione Firmæ againſt Richard James Gent. Walter Webſter and Edward Bley, of a Meſſuage and divers Lands thereunto belonging, in Yeſtley in the ſaid County of Oxford demiſed unto him by Philip Pits Gent. To which the Defendants pleaded not Guilty; and the Jury found that one Sir Richard Aberbury Knight, was ſeiſed of the Manor of Donnington in the County of Berks, and of the Manor of Yeſtly in the County of Oxford (whereof the Lands in Queſtion are Part:) And in the 16 Year of King R. 2. had a Purpoſe to found an Hoſpital at his

Caſe adjudged upon the Statute of Chantries. In which was alſo a great Point, touching Miſnomer of Corporations. 1 Ro. 416. Meſme Moo. 865. 1. Brownl. 178, 187. Benl. 117.

Manor of Donnington, for certain Poor Perſons to ſerve God, & precipue to pray for the Souls of King Richard and himſelf while they lived, and after; and for the Souls of the King's Progenitors and Heirs, and his own Anceſtors and Heirs for ever, according to ſuch Ordinances as he ſhould make.

Then they find, that the King taking Knowledge of his Godly Purpoſe, to further the ſame, and to make himſelf Partaker of the Benefit thereof, did give him License by his Letters Patents to found the Hoſpital at his Manor of Donnington for certain Poor, whereof one ſhould be above the reſt, and ſhould be called Miniſter Dei, pauperis Domus de Donnington; and that he might give to the Miniſter and Poor, and their Succeſſors, two Acres of his Manor of Donnington for their Habitation, and the Manor of Yeſtley for their Suſtentation, to ſerve God; and eſpecially to pray for the Souls ut ſupra, according to Ordinances ut ſupra. Then they find that Abberbury did Erect the Houſe, and Place Poor according to his Purpoſe and the King's License. Then they find, that he by his Deed 17 R. 2. reciting, that he had founded the Hoſpital of certain Poor to pray for the Souls, &c. ut ſupra, appoints Walter Cleare to be above the reſt, and he and his Succeſſors to be called Miniſter Dei, pauperis Domus de Donnington, and then gives dicto Waltero, in pauperibus confratribus ſuis, the two Acres and the Manor of Yeſtley, habendum dicto Waltero, Miniſtro & pauperibus confratribus ſuis & eorum ſucceſſoribus imperpetuum, and no Mention there of Prayers.

Then he makes his Ordinances with this Title (inter alia) pro ſalubri ſtatu of the King and himſelf, during Life and after, for the Souls ut ſupra.

And there is one Ordinance amongſt the reſt, that the Poor ſhall every Day go to Maſs, to a Chappel of Friers near adjoining, and ſhall ſay 50 Pater Noſters, and as many Ave Maries. Then they find, that (after many others) one Thomas Letherland was made Miniſter there, and that he and his Confreres, by the Name of Thomas Letherland Yeoman, Miniſter of the Alms-houſe of God of Donnington; beſides, Newbury in the County of Berks, and the Alms-men Confreres of the ſame Houſe, did Demiſe unto David Lewes Doctor of Law, the Manor of Yeſtley (whereof the Land in Queſtion is Part) for the Term of 80 Years, which Leaſe was made in 8 Eliz. and that Leaſe by mean Conveyances is brought down to Philip Pits, who made the Leaſe to the Plaintiff ut ſupra, entring upon Richard James who was in Poſſeſſion, and Richard James and the other Defendants re-entred. And ſo concluded upon Guilty or not Guilty. And Judgment upon this Caſe was given for the Defendants, that the Plaintiff ſhould be barred becauſe he had no Title, and therefore could not juſtifie to enter upon Richard James.

This Caſe was divided into two great Points.

The firſt, whether this were not an Hoſpital diſſolved, and given to the King by the Stat. 1 E. 6. of Chantries.

The ſecond, whether the Leaſe made by Letherland (under which the Plaintiff Claims) were made according to the Name of Corporation or not.

First great Point. As to the firſt Point, Warburton, Winch, and my ſelf (for Nichols was Dead) were all of clear Opinion, that it was a Superſtitious Hoſpital, and ſo given to the Crown, and ſo the Plaintiff could have no Title. And therefore we held clearly, that though the Word (Hoſpital) was not in the Law of 1 E. 6. as it was in the Law of 37 H. 8. yet that was not Material; for the Life of the Law, which is the Meaning, did not upon the Statute 37 H. 8. reach unto Hoſpitals erected meerly for Poor, without Superſtition, though the Word were there; and this Law without the Word reacheth to them being Superſtitious. And therefore where all Manner of Colleges are given, yet the Colleges of the Univerſity are not given, but Superſtitious only (under which Word, this being a Collegiate Body Superſtitious, is well and Litterally given.) And yet where a Law is made Beneficial for good Colleges, it ſhall be entended in their Favour, as 9 Eliz. Dyer 255. The Statute made 1 & 2 Phil. & Mar. to make good Deviſes to Spiritual Corporations was extended to Trinity College in Cambrigde; whereof I hold the Reaſon to be, becauſe it was Principally ordained for the

1 Co. 25. b. 117. a.

the Study of Divinity; for I hold clearly, that it would not have been ſo in a College ordained for Phiſicians or Civilians.

And therefore I hold clearly, that the Proviſo in the Statute for Colleges in the Univerſity was but abundans cautela, as was ruled in Porter's Caſe for Terry his Will. And yet the Statute gives the King Power to change Superſtitious Uſes in ſuch Colleges, ſo the univerſal Decree of State was not to tolerate any Superſtitions any where. 11 Co. 71. a.

Next I hold clearly, that Parochial Prieſts were not within the Law (though they were within the Words.) And therefore firſt, if a Man had in time of Popery given Land to a Parochial Prieſt, for his better Maintenance in his Function, and ſaying of Divine Service, this had not been within the Law, though the Ordinary Service were at that time Superſtitious; for the Original of his Function was not for Superſtition, but for God's Service, which ſtands by publick Authority, but grew to Abuſe after. But if a Man give Land to a Pariſh Prieſt to pray, or ſay Maſs for his Soul, this is within the Law, as it is held, 16 Eliz. Dyer 337. for to this Purpoſe he is a Souls-Prieſt, not a Parochial. The ſame I hold of all Chapels of Eaſe erected meerly as Members of the Parochial Church, and for that Publick Uſe, that they had been out of the Law, though there had been no Proviſo for them; otherwiſe it would be if they had been erected for Obits at the firſt. The ſame I hold of Cathedral Churches though they had not been named. Benl. 44.

Bendloſe his Caſe of Gift to pray for Souls, ſo long as the Laws of the Realm ſhould permit, was judged out of teis Law.

Yet the Statute gives unto the King Chantries in them, ſo the Statute was not ſo good to Churches as Colleges.

So we held this Hoſpital to be within the Law, in the firſt and ſecond Branches, as a Superſtitious Collegiate Body legally Corporated, and therefore in that Point ſtronger than the Caſe of the Collegiate Church of Lanway Brevy, 9 Eliz. Dyer 267. which was but a pretended Corporation: And it was obſerved, that this Statute did mean to extend to lay Corporations and Companies as well as Spiritual; for it hath one Clauſe of plain Gift of all Guilds, &c. except of Crafts and Miſteries. Again, it gives all Profits paid even by Corporations of Miſteries. And a third Clauſe, that it ſhould not be prejudicial to general Corporations of Cities or Towns.

And though it was ſaid, there was never Judgment given of a Lay Hoſpital for Relief of the Poor; it was anſwered, that this Hoſpital was not ſo much erected for the Relief of the Poor, as for Prayer for Souls, as appears by all the Parts of the Caſe, that the Poor were but cheap Hirelings to pray, &c. And that was the final Cauſe, which is Cauſa cauſarum, whereof it is truly ſaid, Unumquodque eſt id, quod eſt principalius in ipſo; and, intentio mea nomen imponit operi meo. So this indeed was a Superſtitious Conventicle, for it is truly ſaid in Adam's Caſe, fol. 113. a. that Prayer for Souls was the general Matter of all Obits, Anniverſaries and the like, which were but ſeveral Forms of Prayers for Souls. And even in Adam's Caſe in Barton's Will the Land is given to his Friends, and one Uſe appointed for ſix poor Folks: But (becauſe it was to pray for Souls) it was adjudged within the Law, which is in Effect and Reaſon a Judgment againſt Lay Hoſpitals, for Poor ordained ſo to pray for Souls; for it is one in Reaſon, whether the Poor ordained ſo to pray be aggregate in one Body, or divided as ſeveral Perſons, as they were there, and in many other Caſes cited in that Caſe, if their Maintenance end in Prayer for Souls. And where it was objected, that in this Caſe the Prayer for Souls was referred to Ordinances, and there was no ſuch Ordinance made, it was anſwered two ways: Firſt, if there were no Ordinance to that End, then Part were void, and ſo they were bound by the general Purpoſe and End of their Inſtitution, expreſſed in all Parts of the Verdict to pray at home and in Private, as Littleton, Chap. Frankalmoigne. The Tenant is bound to ſay Maſs, and Pray for the Soul of the Founder: Yet there is no ſuch Thing expreſſed in the Tenure but to hold in Frankalmoigne, but the Reaſon of the Gift and Intent of the Giver makes up the reſt.

Next, the Ordinance for hearing and attending Maſs, &c. was clearly an Ordinance for that Purpoſe; for Maſs was holden Propitiatory for the Quick and Dead. And therefore though in this Caſe the Friers Chapel, and the Maſſes there were not inſtituted for Abberbury; yet the Poor attending might, and ought by their Order to apply thoſe Generals to the Souls for which they are bound to pray, even as any Chriſtian applies to the general Prayer of the Church to his own Soul's Health.

Now if the whole Hoſpital had not been given to the King, yet the Clauſe of Obits, Anniverſaries, by the Words (or other like Intent and Purpoſe) clearly would have given the Lands to the King, becauſe the whole was given for ſuch Purpoſe, ſcil. for Prayer for Souls; and ſtronger than the Caſe cited in Adam's Caſe, where ſuch Gifts were but in Part, but Uncertain, ſo as the King muſt have all, elſe he could have nothing.

4 Co. 112. b.

But this Clauſe (as I obſerved) could give the King nothing, becauſe the Verdict found no Imployment within five Years, which upon that Clauſe was Neceſſary; but not upon the other, which gave the very College or Hoſpital it ſelf to the King.

But in general our Caution muſt be obſerved, that the Superſtition muſt be Plain and not Imaginary, and therefore in Porter's Caſe the Will made Proviſion for the Maintenance of Beadſmen. Now though the Praying by Iteration of Numbers, and Beads, was a ſuperſtitious Vanity, yet becauſe the Word of Beadſmen was grown into a common Acceptation for Poor People praying for their Benefactors, it was not preſumed to be for the Souls of the Dead (though it were commonly ſo uſed) and ſo was judged no Superſtitious Appointment.

Latch. 38.

Now in the ſecond great Point I obſerve, that the true Name was not found in a direct Clauſe according to the Modern and exact Form, but it is only made by Collection; the Miniſter being named by himſelf exactly in the King's Licenſe, but the Poor are not there joined in the Name, but afterwards in the Grant of the Land of Abberbury, and ſo more fully and directly to be gathered out of Connexion of the Clauſes, than in Doctor Eyries Caſe. Now then to the Miſnomer, there was Addition in theſe (beſides Newbery in the County of Berks) which was not regarded though it were not found by the Verdict to be ſo ſeated, becauſe it ſhall be preſumed true, as in Harper's Caſe, Coke lib. 11. 25. If a Man Covenant to ſtand ſeized to the uſe of I. S. his Couſin, he need not to aver that he was his Couſin, and yet it is Neceſſary, but it muſt come on the other Side; and this is but a Surpluſage to make the Name a little more certain, which before was full and perfect of it ſelf. But you muſt not ſo follow the Truth of the Preſent, that you loſe the known Name and Notion which is the uſe of Nomination, as was in the Caſe of Hale and Wingate, where Windſor College being founded by Ed. 4. by the Name of the Dean and Canons of the King's free Chapel of Windſor, the Leaſe was made in King Philips Time, by the Name of the King and Queen's free Chapel, for this was a Variance in the very Body and Subſtance of the Name (not in an Excreſcence) though it were in ſome ſort true.

A Great Point.

In this Caſe of the Church of *Norwich*, the Addition *Ex fundatione Regis* E. 6. may perhaps be of a doubtful Judgment. Poſt. 228. 2 And. 120. 3 Co. 75. a. 1 Cr. 170.

10 Co. 124.

Now touching the Words [Brethren] for Confreres, [Almſhouſe and Alſmen] for Poor Houſe and Poor Men, [Brethren of the Houſe] for Brethren of the Miniſter; theſe Differences were not regarded.

2 And. 116.

So in Concluſion the great Objection was, that where the true Name was Miniſter Dei pauperis Domus, it was made Miniſter pauperis domus Dei in the Leaſe, which was ſaid to be an Inverſion not only of Words and Order, but alſo of Senſe and Matter.

Mo. 539.

For whereas the Inſtitution was, that the Miniſter præſit cæteris, here he is made a Servant to the Houſe, clean contrary. And of this Opinion Juſtice Warburton was: But my Brother Winch and I were plainly contrary, whereof I gave this Reaſon, that Miniſter doth not always import an Inferior to him, to whom he doth Miniſter: For the Pſalm ſaith, God hath made Man paulo inferiorem Angelis; and yet in the firſt Chapter to the Hebrews it is ſaid, that the Angels are miniſtring Spirits, ſent forth for the Good of God's Saints.

And the Pope in Imitation of the Truth calls himſelf Servus Servorum Dei, for it is true, that Governors both Civil and Eccleſiaſtical ſerve the People. And therefore Saint Bernard ſaith well, Prælati non tam ſtudeant præeſſe quam prodeſſe. And our Saviour, Mat. 23. 11. He that is greateſt among you, let him be your Servant.

Now touching this Name to prove, that as it hath all the Words in Number, Sound and Notion, ſo in Effect and Matter obſerve, that the Word Miniſter is nomen æquivocum, multiplex, ambiguum, relativum; and therefore Dei is added for Relation.

So now you have Miniſter for Servant, and God for his Lord and Maſter. But yet you have not his Imployment and Service; for though all good Men be called God's Servants in their general Vocation, yet they cannot be called the Miniſters of God but to a more ſpecial Uſe: And that κατ' ἐξοχὴν is underſtood prima facie of the Clergy, but that fits not this Caſe, for he is by Inſtitution Lay. Therefore you muſt yet find his other Service, which follows, that he is the Miniſter of God of his poor Houſe at Donnington: That is as much as to ſay, the Miniſter of God for, or about his poor Houſe, &c. ſcil. in that Service, ſo Gods Service in this Name is the Service of God's Houſe, and therefore they are Convertible: And who ſees not, that whoſoever Miniſters to the Poor, Miniſters to God? As it appears in that ſolemn Sentence of the laſt Day, In as much as you did Feed, Cloath, Lodge the Poor, you did it unto me.

The hardeſt Caſes that were ever adjudged upon thoſe Miſnomers have been either upon Omiſſions or Additions; as Fiſher and Boys Caſe, for Omiſſion of the Word Scholares in a ſecond Part of the Name, which I ſhould hardly have judged, for ſince they were named the Scholars of the Houſe in one Part of the Name, it muſt follow that it was the Houſe of the ſame Scholars (which was all that wanted) as Burgeſſes of Lynne implied that Lynne was a Borough. 10 Co. 125. a. 11 Co. 20. a. b. 11 Co. 159. a.

And Paſchall and Fanſhawe's Caſe of the Savoy, or called the Savoy, was a hard Judgment, for things ſhall be ſuppoſed to be named according to Truth: And therefore in the Caſe of Lynne, the Meaning of Lynne Regis was adjudged to import that it was called Kings Lynne. And indeed upon that Judgment a Writ of Error was brought and compounded, and therefore it is no very firm Authority. 1 Le. 159. Mo. 228. 10 Co. 32. b. 125. b. 126. a.

And this Caſe is made more full by the Verdict, which finds that the true Maſter and Brethren did make the Leaſe by the Name prout, which cautious Courſe of finding is commended in the Caſe of Lynne.

And ſo I conclude this Point with two excellent Authors Divine and Humane: Tully thus: Exiſtunt ſæpe Injuriæ calumnia quadam & nimis callida, ſed malitioſa Juris interpretatione, ex quo illud ſummum jus ſumma injuria.

And Eccleſiaſticus chap. 19. ſpeaks of this elegantly, thus:

There is a certain Subtilty that is fine, but it is unrighteous, and there is that wreſteth the open and manifeſt Law; yet there is alſo that is wiſe and judgeth righteouſly. So he makes three Degrees: Some impudent to give falſe Judgment groſly; ſome others as wicked, yet do it more cunningly under Pretence of ſtrains of Law. But a Man may be as wiſe and fine to Juſtice as any others to Fraud: And ſo I commend the Judge, that ſeems fine and ingenious, ſo it tend to Right and Equity, and namely, that in theſe Caſes of captious Miſnomers doth mold the ſmall Diſorders of the Name to make good the Contract and Bargain. And I condemn them, that either out of Pleaſure to ſhew a ſubtil Wit will Deſtroy, or out of Incurioufneſs or Negligence will not Labour to ſupport the Act of the Party by the Art or Act of the Law.

(156) Slater *verſus* Franks.
Trin. 14 Jac. Rot. 1953.

Parole Mainſworn. Note, that though the Word be not underſtood in all Places, yet it is in Engliſh, and therefore needs not the Averment as the Welſh doth. Ant. 117

SLater brought an Action of the Caſe againſt Franks, for ſaying, Thou art a mainſworn Lad, and a Bankrupt Lad. And after a Verdict it was ſaid, that theſe Words bear no Action, for it was not averred in the Declaration that he was a Merchant, ſo the Word Bankrupt was of no Force; which was confeſſed, and ſo it ſtood upon the Word Mainſworn: Againſt which it was ſaid, that it was an unknown Word in theſe Parts, and of an uncertain Senſe, though in the North Parts it was underſtood to be as much as Perjured, or Forſworn with his Hand upon the Book. Now it was not averred that it was ſpoken in the Preſence of ſuch as underſtood the Word, nor that the Word imported Perjury. And yet we gave Judgment for the Plaintiff. And another like Judgment we gave this Term upon the ſame Word. And the very like Judgment was given Hill. 10 Jac. Rot. 1783.

Verdict and no Iſſue. 1 Ro. 46. 2 Ro. 443. Baron & Feme, Br. 54. Cr. Jac. 6.

V. Hill. 10 Jac. Rot. 1783. in Brownlow's Reports 4. adjudged, &c. 1 Cro. 417. utra 2 Cro 530. Yelv. 210. 3 Cro. 883.

And Hill. 1 Jac. Rot. 1372. Small brought an Action againſt Bell and his Wife, becauſe the Wife called him a Mainſworn Thief, and the Defendants pleaded not guilty, and found for the Plaintiff. But there he could have no Judgment, becauſe the Defendants ſhould have pleaded that the Wife only was not guilty, ſo there was no Iſſue in Effect joined. 2 Cro. 6.

(157) Action for Welſh Words.

3 Cro. 496. Poſt. 191. Ant. 117. Hutt. 8. Sembl' 3.

IN the Exchequer an Action of the Caſe was brought by againſt for calling him Idonor in the Welſh Tongue, and did aver that it was in the Preſence of divers that underſtood the Welſh Tongue, but did not aver what the Word did import, and yet Judgment was given for the Plaintiff, and the Court took Information by Welſhmen what the Word meant in Engliſh, wherein they were ſatisfied that it was as much as perjured in Engliſh.

And the like Judgment in the Common Pleas, and upon the like Form of Declaration was found upon Search in the Common Pleas, between Gillam Verch, Howell, againſt Evan George, for a Slander in Welſh Words, Tr. 43 Eliz. 3024. and another Paſchæ 44 Eliz. Rot. 834. And at this Time Serjeant John Moore informed the Court, that Judgment had been given in the King's Bench, 6 Jac. in the Caſe of one Tuck, upon theſe Words, Thou art an Healer of Felons, without any Averment how the Words were taken, becauſe the Court was informed, and took Knowledge, that in ſome Countries it was taken for a Smotherer or Coverer of Felons.

Yelv. 153. 3 Cro. 250 Noy. 19, 133.

Q. *Imped.* (158) Chancellor, &c. *of* Cambridge *verſus* Walgrave.
Mich. 14 Jac. Rot. 647.

Mo. 872. Poſt. 164. Incumbent, Br. 7.

SIr Edward Walgrave knight, Henry Yaxley Eſquire, and William Moore and others, were ſued in a Quare Imped. by the Chancellor, Maſter and Scholars of Cambridge, and they claimed the Preſentation of the Church of Colney by the Statute of 3 Jac. becauſe that Yaxley being Patron of the Church at the Time of the Avoidance by the Death of Johnſon laſt Incumbent, was then alſo a Popiſh Recuſant Convict. To this all the Defendants pleaded, but the Material Plea was Walgraves, which was thus (the others reſting upon the ſame Title) He did Confeſs that Yaxley was ſeiſed of the Manor of Eaſt Hall, ad quod, &c. in his Demeſn as of Fee, and that he was a Popiſh Recuſant; but he ſaid, that for Non-payment of 20 l. a Month, by Commiſſion ſent forth and Inquiſition taken, it was found before the Commiſſioners that the ſame Yaxley was ſeiſed at the Time of his Conviction of the ſaid Manor, ad quod, &c. and thereupon the ſaid Commiſſioners, by Virtue of their Commiſſion, did ſeize two Parts of the ſaid Manor into the King's Hands, and that the King did by his Letters Patents, under

The Patron of an Advowſon a Popiſh Recuſant. 10 Co. 58. a. Jones, 17.

29 El. cap. 6.

under the Seal of the Exchequer, Demiſe unto the ſaid Walgrave, the ſaid two Parts of the Manor with the Appurtenances, and all Profits, Commodities, and Hereditaments to the ſame belonging for 21 Years, ſi tam diu, &c. And then ſhew, that the Church became Void (as before) (Yaxley ſtill remaining a Popiſh Recuſant Convict) by Reaſon whereof he preſented Moor his Clerk, one of the Defendants, abſque hoc quod præd. Henr. Yaxley was Patron of the ſame Church at the Time of the Avoidance, as the Plaintiffs have declared, upon which plea the Court conceived plainly, that the Title to this Avoidance did appear to be in the King, for the Statute gives two Parts of all the Recuſants Poſſeſſions; ſo that though there be no Mention made in the Inquiſition, and Seiſure of the Advowſon ſpecially, yet two Parts of the Advowſon will follow two Parts of the Manor, and then the King will Preſent alone. And the next Point is, that there are no Words in the King's Grant to Walgrave to carry the Advowſon from the King; yet, becauſe this ſerved only to prove the King's Title againſt the Defendant, the Court would not Award a Writ to the Biſhop, for the King (being no Party to the Action) except his Title were clear, and without Doubt againſt all the Parties to the Action, according to the Books. Whereupon (as in the Record is entred) the Plaintiffs were demanded by the Court, if they had any thing to ſay, why a Writ to the Biſhop ſhould not be judged to be directed for the King upon his Title, appearing on the Defendants Plea, who did Confeſs, that ſuch a Writ ought to be adjudged, and that they had no Title to this Preſentation, notwithſtanding their Title in their Declaration by them made, which now they do wholly diſclaim. Whereupon Judgment was given for the King, that he ſhould have a Writ to the Biſhop, that notwithſtanding the Reclamation of the Defendants he ſhould Remove Moor the Incumbent, and ſhould admit idonneam perſonam ad præſentationem Dom. Regis.

1 Cr. 590. N. B. 38. c

Poſt. 163, 168. 1 Cro. 590, 592. 2 Cro. 216, 246.

(159) Scaiſe *verſus* Nelſon. Caſe.
Mich. 12 Jac. Rot. 1106.

SCaiſe brought an Action of the Caſe againſt Nelſon and his Wife, for Scandalous Words ſpoken by the Wife. And had Judgment & præd. la femme in mia, &c. where both ought to be amerced, and upon a Writ of Error, the Record was certified into the King's Bench; and yet by Order of the Court here it was amended, becauſe upon View of the Book of Judgments of Goldsborough the Prothonotary, it appeared there well entred and directed. 1 Cro. 574. Cr. Jac. 439, 633.

Amendment of a Judgment by the Book of Judgments. 1 Roll. 206, 215. Brownl. 1. R. 16. Ant. 119. Poſt. 184. Winch. 9. Moor. f. 869. Amendment, Br. 14, 56, 74.

(160) Sir Henry Warner *verſus* Wainsford.
Tr. 13 Jac. Rot. 1906.

Obligation.

SIr Henry Warner brought an Action of Debt againſt Wainsford Adminiſtrator of Kirby, who pleaded, that the Inteſtate was indebted unto him by divers Obligations (and recites them) to the Sum of 80 Pounds, and that Goods to that Value, and not above, came to his Hands, which he detains for his Debt, and that he had nothing ultra. The Plaintiff demurred in Law, becauſe it amounted unto the general Iſſue of pleinement Adminiſter. But the better Opinion of the Court was, that this is no Cauſe of Demurrer, for the Plea is Sufficient; and beſides it is ſome Matter in Law, which hath been allowed always to be pleaded eſpecially, and not left to a Jury; and the Reaſon of preſſing a general Iſſue is not for Inſufficiency of the Plea, but not to make long Records when there is no Cauſe, which is Matter of Diſcretion, and therefore it is to be moved to the Court, and not to be demurred upon.

Pleas amounting to general Iſſue. 1 Cr. 159. Winch. 19. Cr. Jac. 165. Syd. 126. 1 Cr. 157, 158. 1 Le. 178, 251. 2 Cr. 746. Poſt. 218. Accord.

2 Ro. 140. Vide 10 Co. 95. a. contrary Dr. Leyfeild's Caſe.

Pie

(161) Pie *verſus* Coke. Information.
Tr. 14 Jac.

Informations ſeveral at one Day, for one Offence. 1 Roll. 353. Poſt. 209. Moor 864. 5 Co. 19, a. 38. b. Plo. 10. b.

PIe the Informer exhibited an Information againſt Peter Coke Clerk, for taking of Farms. And now it was moved by Serjeant Hutton, that another Information was exhibited by another Informer, for the very ſame Offence, and both exhibited upon one Day; ſo there was no Priority to attach the Right of Action in the one more than in the other, and therefore the Court adviſed them to plead the Truth of his Caſe, for it was ſufficient to bar them both, in as much as there being no Precedency of Suit to attach it in either: The Court could give Judgment for neither.

Ebor. (162) Oglethorp *and* Maud. Aſſize.

Amendment *(illum)* for *(illam.)* 1 Roll. 198. Mo. 866.

IN Aſſize between Oglethorp and Maud, the Writ was ad faciendum Recognitionem illum, which ſhould have been illam, and it was moved to have been amended, and Harriſon the Curſitor was called into the Court, who made Oath, that a Note by him produced in Court (which was Right) was the original Note, whereby the Writ was made; yet, becauſe in Pennington's Aſſize 11 H. 7. the like Fault in the Writ would not be amended, the Court would be adviſed.

Ant. 118. 3 Cr. 19, 644. 1 And. 24.

Ebor. (163) Perkin *verſus* Perkin. Ejectione.
H. 13 Jac. Rot. 979.

Inrolment will ſerve, if it be before the Juſtice of Peace of the Riding where the Land lieth. 1 Brnl. 131. 27 H. 8. Cap. 16

PErkin brought an Ejectione Firmæ againſt Perkin, the Defendant pleaded a ſpecial Bar, which was Inſufficient; the Plaintiff replies, and conveyed the Land to his Leſſor by Bargain and Sale, acknowledged before Tempeſt a Juſtice of Peace of the Weſt-Riding, and Cartwright Clerk of the Peace there, and enrolled within ſix Months. And the Plea was holden Sufficient, becauſe it did not appear that the Land in Queſtion, which was conveyed, did lie within the Weſt Riding, but generally in Yorkſhire. But it was holden clearly, that though the Words of the Statute be before the Juſtices of the Peace of the County, yet it will ſerve before a Juſtice of the Peace of the Weſt Riding, if the Land lie there: Quære of a Corporation, &c. within a County. So in this Caſe though the Bar were naught; yet becauſe the Plaintiff made no Title in his Replication, he could have no Judgment.

Poſt. 199. 2 Cr. 133. Ant. 14. 1 Cr. 300. 8 Co. 120. b. 133. b.

Ebor. Brownlow. (164) Withes *and* Caſſon. Treſpaſs.
Hill. 12 Jac. Rot. 1964.

2 Ro. 52. Winch. Ent. 1066. 1 Cr. 399. Dy. 93, b. 116. b. 1 And. 3. Co. L. 46. b. Cart. 149.

WIthes brought an Action of Treſpaſs againſt Caſſon, for taking of his Beaſts at Seaton, in a Place called Borough Cloſe. The Defendant avowed for himſelf and his Wife, and made Conuſance for Elizabeth Caſſon, and pleaded, that Philip Fairfax Knight was ſeiſed of it in Fee, and 2 of Octob. quinto Jac. did Demiſe it unto Ralph Lowſon Habend. from the Feaſt of the Annunciation next after for 21 Years, rendring Ten Pounds per Annum at the Feaſt of St. Michael, and our Lady-day; and that Philip Fairfax 8 of September 8 Jac. by his Deed reciting the Leaſe ut ſupra, did Bargain and Sell the ſaid Reverſion and Rent unto his Wife and Eliz. Caſſon Habend. for their Lives, if the ſaid Term of Twenty one Years ſhould ſo long endure, and for 25 Pounds Rent behind at St. Mich. in the Tenth Year of the King he did Avow and make Cognizance as before. The Plaintiff pleaded in Bar, that Philip Fairfax did not grant the ſaid Reverſion modo & forma; the Jury found all the Matter juſt as it was laid by the Defendant, ſaving that they found that the Leaſe unto Lawſon was made Habend. à Feſto Purific. and not à Feſto Annunciationis. And that Fairfax in his Bargain and Sale

A Grant of a Reverſion on Leaſe miſ-recited. 6 Co. 36. a.

of

of the Reverſion did recite the Leaſe made unto Lawſon, habendum à Feſto Annunciationis, which was not ſo, and then granted the ſaid Reverſion and Rent prout. And yet the Court una voce gave Judgment for the Avowant, and held it to be a good Grant of the Reverſion and Rent, which was the point in Iſſue. 1 Cro. 399.

(165) Marſhall *verſus* Steward. Caſe.
Mich. 13 Jac. Rot. 1134.

MArſhall brought an Action of the Caſe againſt Steward, reciting the Stat. of 1 Jac. of Invocation of Foul Spirits, (which was needleſs) for ſpeaking theſe Words unto him, the Devil appears unto thee every Night in the Likeneſs of a Black Man, riding upon a Black Horſe, and thou conferreſt with him, and whatſoever thou doſt aſk him he doth give it thee, and that is the Reaſon thou haſt ſo much Money. And after a Verdict finding the Words, the Court gave Judgment for the Plaintiff. Brownl. 1 R. 8. Mo. 868. 1 Roll. 46, 49. Yel. 150. 2 Cro. 399. utra. Conferreſt with the Devil.

(166) Wilton *and* Hardingham. Treſpaſs.
P. 14 Jac. Rot. 1531.

WIlton brought an Action of Treſpaſs againſt Hardingham; the Defendant juſtified, that the Plaintiff was a Common Baker, dwelling in Timſteed in the County of Norfolk, and that it was preſented in a Leet in Timſteed, that he had ſold Bread againſt the Aſſize in locis vicinis, whereupon he was amerced, and by Amerciament aſſered to 10 s. and that by a Precept out of the Court he did diſtrain the Plaintiff; and the Court gave Judgment for the Plaintiff, becauſe it doth not appear, that the Offence was committed within the Juriſdiction of the Leet, which ſhall not be preſumed with us except it be Specially pleaded. But perhaps the Preſentment in the Leet is good enough without ſpecial Mention in the Preſentment, that it was done in the Juriſdiction, if the Truth were ſo. And yet note, that the Preſentment is not ſo Full and Perfect, therefore let them beware. And I noted, that the Plea was Abſurd; for it was ſaid, that he was amerced without ſaying (what) and that the Amerciament was aſſered to 10 s. for which he diſtrained. Now the Jury muſt amerce to a certain Sum, which may be mitigated and aſſered by others, and therefore theſe Offices cannot be confounded. 2 Cr. 582. 3 Cr. 886. 1 Le. 242. Amercement in Leet. 2 Cro. 492. Noy. 34. Poſt. 142. Ben. 91. 2 Cr. 96. 1 Inſt. 126. b. 2 Keb. 613. p. 55. 8 Co. 40. b. Jones 301. 1 Cr. 275.

(167) Cowley & Uxor *againſt* Poulton & Uxor.

COwley and his Wife brought an Action upon the Caſe againſt Poulton and his Wife, for Scandalous Words ſpoken by one of the Women of the other Woman. And after a Verdict, the Court was informed that one of the Women was Dead; whereupon Judgment was ſtayed. Yel. 113, 209. 1 Cr. 574. 1 Cr. Car. 208. Cr. Jac. 19, 356. Cr. Car. 250. Styles 299. 1 Ro. R. 51. Hard. 152. Br. Error, 117. Syd. 93, 131, 143, 238 2 Cro. 63. utra. Death after Verdict, and before Judgment.

(168) Sir George Griſley's Caſe.

SIr George Griſley, now Baronet, was bound in a Statute Merchant of a 1000 Pounds before the Mayor of Coventry to one Drury, and now upon a Certificate made by the Mayor into the Chancery, took out a Capias againſt Griſley by the Name of George Griſley Eſquire, as he was named in the Statute returnable the laſt Term. Whereupon Writs of Extend were made into the Counties of Derby and Stafford, which were executed and returned. And now Montague prayed that all might be amended. But it was denied by the Court. And he was willed to ſue a new Writ out of the Chancery upon the firſt Certificate, ſc. Capias Corpus Georgii Griſley, Mil. & Baronet. qui per nomen G. G. Armigeri recognovit, &c. for this was Matter that muſt come of the Information of the Party. Baronet muſt be ſued by the Title. 1 Roll. 198. 1 Cro. 104 371. Cr. Jac. 482. Poſt. 327. 11 H. 7. 25. a. vi. Latch. 169.

(169) Wilson's Case.

1 Cr. 282. 2 Cr. 108, 109. Jones, 304. Bill not filed, helped by Verdict. Post. 134.

ONe exhibited a Bill de placito debiti versus Wilson, an Attorney of this Court. And after a Verdict it was moved in Arrest of Judgment, that the original Bill was not filed with the Custos brevium, as it ought to be. But it appeared to to the Court, that the Tenor of the Bill was entred of Record in hæc verba. And it seemed to the Court, that this was remedied by the Statute of Jeoffailes, as being in the Nature of a Want of an Original after Verdict. But yet because it was said, it had been otherwise ruled in the Case of one Matthew Rood an Attorney, the Court would Advise.

1 Saund. 318.

1 Cr. 282. Plo. 38. 2 Cr. 186, 580. 2 Cro. 109. ultra. Post. 264, 281. Jones, 304.

Note, that it hath been since judged in the Common Pleas cured by Verdict, and so also in the Exchequer-chamber upon Error out of the Kings Bench upon Want of a Bill there, yet the Words of the Statute are [Want of original Writ.]

(170) Saint-John *against* Diggs. Obligation.
Tr. 11 Jac. Rot. 3336.

Recital bindeth not. Post. 284. 1 Cr. 77.

SAint-John brought an Action of Debt against Diggs upon an Obligation, and the Condition was, that the Defendant should pay to the Plaintiff 10 Pounds, which is for a Rent of certain Lands; the Defendant alledged, that the Plaintiff had entred upon the Land, and so suspended the Rent, whereupon the Plaintiff demurred in Law, and it was adjudged for him; for this being but a Recital that it was for Rent, it is not Material. It seems the same, though he had applied it by pleading to the Lease, &c.

(171) Wilby *and* Quinsey. Habeas Corpus.
H. 12 Jac. Rot. 2036.

Ant. 113. Mo. 868. 1 Roll. 204, 295. *Album breve.*

BEtween Wilby and Quinsey, the Habeas Corpus was returned Album breve, and thereupon a new Ven. fac. awarded.

(172) Oates *and* Frith. Trespass.
Tr. 12 Jac. Rot. 3264.

Rent reserved to a Son and Heir apparent, but not by name of Heir upon a Lease made by the Father. Ro. 2. Ab. 447. Lit. Sect. 346. Co. Lit. 6, 99. Cont. Post. 151. Co. L. 143, b. 214. b. 5 Co. 112. a. 2 Saund. 370.

BEtween Oates and Frith the Case was, that the Father being seised in Fee, he and his Son and Heir apparent by Indenture leased Land unto the Defendant for Years, to begin after the Death of the Father rendring Rent unto the Son; the Father died, the Lessee entred, and the Rent was behind, and the Son distrained, and the Lessee brought an Action of Trespass and had Judgment; for the Reservation of the Rent was held utterly Void, for though the Son did prove Heir, it bettered not the Case by Event, but the Reservation must have been to the Heir, or Heirs of the Lessor by that Name, for that is the only Word of Privity in Law requisite in Reservation of Rents and Conditions, for the Heir is in Representation in Point of taking by Inheritance eadem persona cum antecessore. And though in such a Case the Rent could never be demanded by the Father, yet the Heir shall take it from the Father as inherent, and rising from the Root of the Reversion, which was his Fathers, and which he takes by Descent from his Father, and so the Rent it self, which was in the Father, though not to demand, because it was not yet due; but yet it was so his, that he might release and discharge it by the Word Rent, though not by the Word Action. And so note a Difference between this Case, where Rent is reserved upon a Lease of the Ancestors to the Heir first, and where the Ancestor Grants an Annuity, or makes a Warranty for a like Charge against his Heirs first admitting himself, all such Grants are utterly Void; for no Man can charge his Heir but as a Part of himself, and therefore beginning with himself. And such Charges stand naked and have nothing, that was first in the Father, and comes from him to them, whereunto they may cleave as a Rent to a Reversion in the former Cases, 1 Inst. vide 378. a. Where a Warranty shall bind the Heir, though the Ancestor was never bound to the same. Nota l'Diversity La.

Co. L. 386. a. Yelv. 189. Cr. Jac. 570. 2 Ro. 70. 1 Inst. 378. a.

Robins

(173) Robins *againſt* Barnes. *Quod permittat.*

Hill. 13 Jac. Rot. 2108.

ROBINS brought a Quod permittat againſt Barnes, Proſternere quandam domum, &c. and counts, that he was ſeiſed of an Ancient Houſe and Yard; and whereas in the Eaſt Part of the ſaid Houſe there is, and Time out of Mind hath been, a Window of ſuch Length and Breadth; the Defendant hath erected a certain Houſe of ſuch Length and Breadth upon his own Freehold ſo near the ſaid Eaſt Part of the ſaid Houſe, that it overhangs the ſame and ſtoppeth his Light, &c. The Defendant pleads, that one Richard Allen was ſeiſed of the Plaintiff's Houſe and Yard, and was alſo ſeiſed of a certain Houſe, ſtanding in the place where the ſaid Houſe of the Defendant now ſtandeth, which did overhang the Houſe of the now Plaintiff, in tam amplis modo & forma, as the ſaid now Houſe of the ſaid Defendant doth. And he ſaith, that he pulled down that Houſe, becauſe it was ruinous, and Built this Houſe in the Place of it. The Plaintiff maintains his Count, and traverſeth, that the Old Houſe ſuperpendebat, &c. in tam amplis modo & forma prout, &c. And the Jury found for the Plaintiff. And now it was ſaid in Arreſt of Judgment, that this was an unperfect Iſſue; for there ought no more of the New Houſe to be proſtrated, than did indeed overhang more than the former Houſe did, which was granted by the Court, if it had been wiſely pleaded. For it was agreed by the Court, that though one of theſe Houſes had been built overhanging the other wrongfully before they came both into one Hand; yet after when they came both into the Hand of Allen, that Wrong now was purged; ſo that if the Houſes came afterwards into ſeveral Hands, yet neither Party could complain of a Wrong before: So that in this Caſe it was Plain, that the Plaintiff could have no Cauſe of Action, but for the Increaſe of the overhanging. Yet becauſe he had not expreſſed and diſtinctly limited that in his Plea, but took Iſſue Generally as before, which was found againſt him, the Court muſt now give Judgment according to the Complaint as true, becauſe they can take no other Knowledge; for the Jury hath not found that the Former Houſe overhanged ſo much, and not the reſt; yet out of their Diſcretion they gave the Plaintiff Judgment for the Whole, and Execution for Damages and Coſts preſently; but ſtaid Execution, as to the abating of the Houſe till it might be viewed what was overhanging de novo; becauſe the Court was informed, that in Truth it was but a ſmall Matter. If I have an Ancient Houſe and Lights, and I Purchaſe the next Houſe or Ground, where yet no Nuſance is done to my former Houſe; now it is clear, that my Privilege, againſt that I have purchaſed, ceaſeth, for I may uſe mine own as I will. Now then ſuppoſe I would Leaſe my former Houſe, I may Build upon the Latter, or if I Leaſe my Latter, he may Build againſt me, as it may ſeem.

Mo. 866.

Nuſance by one Houſe hanging over another, and they both came into one Hand, and are divided again, and the Like.

1 Ro. 937. Syd. 167.

But note, there is a great Difference between Intereſts and Profits, as Rents, Commons, &c. and bare Eaſements, ſuch as are Lights, Air, Gutters, Stillicidia, and the like; for though while they are in one Hand they may be ſtopped, or foredone, becauſe a Man cannot be ſaid to wrong himſelf, yet if they be divided, Things of that Nature (ſtill in Being) do revive, becauſe they are of no leſs Uſe of themſelves in one Hand than in divers, being equally (rebus ſtantibus in the ſame Uſe and Occupation) neceſſary for the ſeveral Houſes to which they belong, but clearly, if even ſuch Things be foredone or altered, while they are in one Hand, and ſo being the Houſes be again divided, they cannot be reſtored by Law, but muſt be taken as they were at the Time of the Conveyance.

3 Cro. 570. Cr. Car. 419. 1 Ro. 935. 11 H. 7. 25. Cr. Jac. 170. Latch. 153. Ow. 112. Pop. 166. 2 Cr. 121. 3 Cr. 300. Palm. 446.

(169) Wilſon's Caſe.

1 Cr. 282. 2 Cr. 108, 109. Jones, 304. Bill not filed, helped by Verdict. Poſt. 134.

ONe exhibited a Bill de placito debiti verſus Wilſon, an Attorney of this Court. And after a Verdict it was moved in Arreſt of Judgment, that the original Bill was not filed with the Cuſtos brevium, as it ought to be. But it appeared to to the Court, that the Tenor of the Bill was entred of Record in hæc verba. And it ſeemed to the Court, that this was remedied by the Statute of Jeoffailes, as being in the Nature of a Want of an Original after Verdict. But yet becauſe it was ſaid, it had been otherwiſe ruled in the Caſe of one Matthew Rood an Attorney, the Court would Adviſe.

1 Saund. 318.

1 Cr. 282. Plo. 38. 2 Cr. 186, 580. 2 Cro. 109. vtra. Poſt. 264, 281. Jones, 304.

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Tr. 11 Jac. Rot. 3336.

Recital bindeth not. Poſt. 284. 1 Cr. 77.

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(171) Wilby *and* Quinſey. Habeas Corpus.
H. 12 Jac. Rot. 2036.

Ant. 113. Mo. 868. 1 Roll. 204, 295. *Album breve.*

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(172) Oates *and* Frith. Treſpaſs.
Tr. 12 Jac. Rot. 3264.

Rent reſerved to a Son and Heir apparent, but not by name of Heir upon a Leaſe made by the Father. Ro. 2. Ab. 447. Lit. Sect. 346. Co. Lit. 6, 99. Cont. Poſt. 151. Co. L. 143, b. 214. b. 5 Co. 112. a. 2 Saund. 370.

BEtween Oates and Frith the Caſe was, that the Father being ſeiſed in Fee, he and his Son and Heir apparent by Indenture leaſed Land unto the Defendant for Years, to begin after the Death of the Father rendring Rent unto the Son; the Father died, the Leſſee entred, and the Rent was behind, and the Son diſtrained, and the Leſſee brought an Action of Treſpaſs and had Judgment; for the Reſervation of the Rent was held utterly Void, for though the Son did prove Heir, it bettered not the Caſe by Event, but the Reſervation muſt have been to the Heir, or Heirs of the Leſſor by that Name, for that is the only Word of Privity in Law requiſite in Reſervation of Rents and Conditions, for the Heir is in Repreſentation in Point of taking by Inheritance eadem perſona cum anteceſſore. And though in ſuch a Caſe the Rent could never be demanded by the Father, yet the Heir ſhall take it from the Father as inherent, and riſing from the Root of the Reverſion, which was his Fathers, and which he takes by Deſcent from his Father, and ſo the Rent it ſelf, which was in the Father, though not to demand, becauſe it was not yet due; but yet it was ſo his, that he might releaſe and diſcharge it by the Word Rent, though not by the Word Action. And ſo note a Difference between this Caſe, where Rent is reſerved upon a Leaſe of the Anceſtors to the Heir firſt, and where the Anceſtor Grants an Annuity, or makes a Warranty for a like Charge againſt his Heirs firſt admitting himſelf, all ſuch Grants are utterly Void; for no Man can charge his Heir but as a Part of himſelf, and therefore beginning with himſelf. And ſuch Charges ſtand naked and have nothing, that was firſt in the Father, and comes from him to them, whereunto they may cleave as a Rent to a Reverſion in the former Caſes, 1 Inſt. vide 378. a. Where a Warranty ſhall bind the Heir, though the Anceſtor was never bound to the ſame. Nota l'Diverſity La.

Co. L. 386. a. Yelv. 189. Cr. Jac. 570. 2 Ro. 70. 1 Inſt. 378. a.

Robins

(173) Robins *againſt* Barnes. *Quod permittat.*

Hill. 13 Jac. Rot. 2108.

ROBINS brought a Quod permittat againſt Barnes, Proſternere quandam domum, &c. and counts, that he was ſeiſed of an Ancient Houſe and Yard; and whereas in the Eaſt Part of the ſaid Houſe there is, and Time out of Mind hath been, a Window of ſuch Length and Breadth; the Defendant hath erected a certain Houſe of ſuch Length and Breadth upon his own Freehold ſo near the ſaid Eaſt Part of the ſaid Houſe, that it overhangs the ſame and ſtoppeth his Light, &c. The Defendant pleads, that one Richard Allen was ſeiſed of the Plaintiff's Houſe and Yard, and was alſo ſeiſed of a certain Houſe, ſtanding in the place where the ſaid Houſe of the Defendant now ſtandeth, which did overhang the Houſe of the now Plaintiff, in tam amplis modo & forma, as the ſaid now Houſe of the ſaid Defendant doth. And he ſaith, that he pulled down that Houſe, becauſe it was ruinous, and Built this Houſe in the Place of it. The Plaintiff maintains his Count, and traverſeth, that the Old Houſe ſuperpendebat, &c. in tam amplis modo & forma prout, &c. And the Jury found for the Plaintiff. And now it was ſaid in Arreſt of Judgment, that this was an unperfect Iſſue; for there ought no more of the New Houſe to be proſtrated, than did indeed overhang more than the former Houſe did, which was granted by the Court, if it had been wiſely pleaded. For it was agreed by the Court, that though one of theſe Houſes had been built overhanging the other wrongfully before they came both into one Hand; yet after when they came both into the Hand of Allen, that Wrong now was purged; ſo that if the Houſes came afterwards into ſeveral Hands, yet neither Party could complain of a Wrong before: So that in this Caſe it was Plain, that the Plaintiff could have no Cauſe of Action, but for the Increaſe of the overhanging. Yet becauſe he had not expreſſed and diſtinctly limited that in his Plea, but took Iſſue Generally as before, which was found againſt him, the Court muſt now give Judgment according to the Complaint as true, becauſe they can take no other Knowledge; for the Jury hath not found that the Former Houſe overhanged ſo much, and not the reſt; yet out of their Diſcretion they gave the Plaintiff Judgment for the Whole, and Execution for Damages and Coſts preſently; but ſtaid Execution, as to the abating of the Houſe till it might be viewed what was overhanging de novo; becauſe the Court was informed, that in Truth it was but a ſmall Matter. If I have an Ancient Houſe and Lights, and I Purchaſe the next Houſe or Ground, where yet no Nuſance is done to my former Houſe; now it is clear, that my Privilege, againſt that I have purchaſed, ceaſeth, for I may uſe mine own as I will. Now then ſuppoſe I would Leaſe my former Houſe, I may Build upon the Latter, or if I Leaſe my Latter, he may Build againſt me, as it may ſeem. Mo. 866. Nuſance by one Houſe hanging over another, and they both came into one Hand, and are divided again, and the Like. 1 Ro. 937. Syd. 167.

But note, there is a great Difference between Intereſts and Profits, as Rents, Commons, &c. and bare Eaſements, ſuch as are Lights, Air, Gutters, Stillicidia, and the like; for though while they are in one Hand they may be ſtopped, or foredone, becauſe a Man cannot be ſaid to wrong himſelf, yet if they be divided, Things of that Nature (ſtill in Being) do revive, becauſe they are of no leſs Uſe of themſelves in one Hand than in divers, being equally (rebus ſtantibus in the ſame Uſe and Occupation) neceſſary for the ſeveral Houſes to which they belong, but clearly, if even ſuch Things be foredone or altered, while they are in one Hand, and ſo being the Houſes be again divided, they cannot be reſtored by Law, but muſt be taken as they were at the Time of the Conveyance. 3 Cro. 570. Cr. Car. 419. 1 Ro. 935. 11 H. 7. 25. Cr. Jac. 170. Latch. 153. Ow. 112. Pop. 166. 2 Cr. 121. 3 Cr. 300. Palm. 446.

Obligation. (174) Grantham *againſt* Hawley.

Trin. 13 Jac. Rot. 3131.

Civitas Lincoln.
Br. Emblements, 5, 9. Leſſor Covenants, &c. that a Leſſee of a Term certain may take the Corn that ſhall be growing at the end of the Term. Ro. 2. 48.

RObert Grantham brought an Action of Debt upon an Obligation of 40 l. againſt Edward Hawley; the Condition whereof was, that if a certain Crop of Corn growing upon a certain Piece of Ground, late in the Occupation of Richard Sankee, did of Right belong to the Plaintiff, then the Defendant ſhould pay him for it 20 Pounds. Now the Caſe upon the Pleading and Demurrer fell out thus: That one Sutton was ſeiſed of the Land, and 30 Eliz. in April made a Leaſe of it to Richard Sankee for 21 Years by Indenture, and did thereby Covenant, Grant to and with Sankee, his Executors and Aſſigns, that it ſhall be Lawful for him to take, and carry away to his own Uſe, ſuch Corn as ſhould be growing upon the Ground at the End of the Term. Then Sutton conveyed the Reverſion to the Plaintiff; and John Sankee, Executor to Richard, having ſowed the Corn, and that being growing upon the Ground at the End of the Term, Sold it to the Defendant. And it was argued by Hutton for the Plaintiff, that it was meerly Contingent, whether there ſhould be Corn growing upon the Ground at the End of the Term, or not. Alſo, the Leſſor never had Property in the Corn; and therefore could not Give nor Grant it, but it ſounded Properly in Covenant; for the Right of the Corn ſtanding in the End of the Term being certain, accrues with the Land to the Leſſor: And it was ſaid to be adjudged. And it was agreed by the Court, that if A. ſeiſed of Land ſow it with Corn, and then convey it away to B. for Life, Remainder to C. for Life, and then B. die before the Corn reapt; now C. ſhall have it, and not the Executors of B. though his Eſtate was uncertain. Note, the Reaſon of Induſtry and Charge in B. fails, yet Judgment in this Caſe was given againſt the Plaintiff, that is, that the Property and very Right of the Corn, when it hapned, was paſt away; for it was both a Covenant and a Grant. And therefore if it had been of Natural Fruits, as of Graſs or Hay, which run meerly with the Land, the like Grant would have carried them in Property after the Term. Now though Corn be fructus induſtrialis, ſo that he that ſows it may ſeem to have a kind of Property ipſo facto in it divided from the Land; and therefore the Executor ſhall have it, and not the Heirs; yet in this Caſe, all the Colour, that the Plaintiff hath to it, is by the Land which he Claims from the Leſſor which gave the Corn. And though the Leſſor had it not actually in him, nor certain, yet he had it potentially; for the Land is the Mother and Root of all Fruits. Therefore he that hath it may Grant all Fruits that may ariſe upon it after, and the Property ſhall paſs as ſoon as the Fruits are extant, as 21 H. 6. A Parſon may Grant all the Tithewool that he ſhall have in ſuch a Year; yet perhaps he ſhall have none; but a Man cannot Grant all the Wool, that ſhall grow upon his Sheep that he ſhall Buy hereafter; for there he hath it neither actually nor potentially. And though the Words are here not by Words of Gift of the Corn, but that it ſhall be Lawful for him to take it to his own Uſe; it is as good to transfer the Property, for the Intent and common Uſe of ſuch Words, as a Leaſe without Impeachment of Waſte, for the like Reaſon, and not ex vi termini, gives the Trees.

It is Conſideration, whether the Law incline more to give the Corn to the Owner of the Land, or to him that Sows it in an indifferent Caſe. Here if the Leſſor ſow it, and then convey the Land to *A.* for Life, Remainder to C. and both die, I hold that the Leſſor ſhall have the Crop that he ſowed. But if it had been ſown by a Diſſeiſor or any other after the Term, it will accrue to the Executor of the then uncertain Termer. 5 Co. 85. a. 3 Cro. 61, 464. Winch 51. 1 R. 727. 3 Leo. 30.

Grant or Gift of that I have, not actually, but potentially. Plo. 13. a. Winch. 7. Mo. 174. Ro. 2. 48.

Plo. 13. a. 21 H. 6. 43. Fitz. Grant. 40. Br. Grant. 123. Br. Contract, 13.

11 Co. 82, 83. Accord 4 Co. 63. a. utra.

Moon

(175) Moon *againſt* Andrewes. Paſch. 12 Jac. Debt.

MOon brought an Action of Debt againſt Andrewes as an Adminiſtrator, and he pleads, that another had gotten a Judgment againſt him for an Hundred Pounds, that he had fully adminiſtred, and that he had no Goods in his Hands tempore brevis originalis nec tempore judicii prædicti, nec unquam poſtea præterquam bona & Catalla non attingentia to an Hundred Shillings; whereupon the Plaintiff demurred in Law generally. My Brother Winch and I were of clear Opinion, that the Plaintiff ought to be barred; for though by the right Form of Pleading he ſhould in ſuch Caſe ſet down in certain to what Value the Goods were, yet that is but Form; for if he had ſaid, that he had Goods to the Value of 100 Shillings, and the Plaintiff had proved that he had 100 Pounds, yet he had gained nothing. So the Subſtance appears in this Plea, that he had not above to ſatisfie the Judgment. And the Statute of 27 Eliz. is a favourable Law and full of Equity, which Judges ought to reach and not to ſhrink: And for the Repugnancy that may ſeem to be, in that he pleads firſt pleniement adminiſtra, and yet afterwards confeſſeth ſomewhat unadminiſtred: All the Precedents are ſo, and the præterquam corrects all, and the unquam poſtea refers not only to the next Antecedent tempore judicii, but alſo to the Time of the Original before. But Warburton did a little Doubt of the firſt Point.

Leiceſter. Brownlow. Adminiſtrator pleads *plene Adminiſt.* &c. Poſt. 218. 9 Co. 109. b. 1 Cr. 361. 2 Cr. 626.

1 Lutr. 4.

(176) Allen *againſt* Walter. Dower.

ALlen and his Wife brought a Writ of Dower againſt Walter of Lands in Munden magna, & Munden parva: And Thomas Broxborne the Sheriff returned Pledges and Summoners, and then added, that poſt Summon. prædictam in forma prædicta factam, he did at Munden magna, where Part of the Tenements lie, at the moſt uſual Door, &c. Cauſe to be proclaimed all that was contained in the Writ, although the Words of the Statute of 31 Eliz. be ſomewhat doubtful (Pariſhes or Chapels where Lands lie) yet the Opinion of the Court was, that the Proclamation in one Town was ſufficient. Firſt, in Imitation of the Common Law, where Summons upon the Land in one Town is ſufficient.

Next, the Words of the Statute are for avoiding of ſecret Summons, and to give convenient Notice to the Party, for that is the Word, both which are ſatisfied in this one Proclamation.

Laſtly, other Expoſition would be full of Miſchief, for the Land may lie in Twenty, and ſo the Notice muſt be at every Town, and every one upon a Sunday, and every one 14 Days before the Return of the Writ; and though there were no actual Summons returned, but only the Names of the Summoners, that was not regarded. For that is all the Form at the Common Law, and there is no Alteration made by the Statute in the Point of Summons; but where he did return, that he had proclaimed the Contents of the Writ, that was Inſufficient; for he muſt Proclaim that he had made Summons of the Land.

Hertford. Summons at the Church-door by the Statute. Brnl. 1. 26.

Cap. 3.

(177) Howell *againſt* Samback. Mich. 13 Jac. Rot. 2009.

BEtween Howell and Samback; the Defendant made Avowry, and conveyed himſelf to 5 Pounds Rent due ſuch a Day, and for Non-payment thereof 80 l. nomine pœnæ; but laid no Actual Demand of Rent, and concluded, that for the ſame 85 Pounds he did diſtrain, and ſo avows. And it was reſolved by the Court, that this Avowry was Inſufficient for the Pain, which could not be forfeited without actual Demand of the Rent; and yet the Return was adjudged unto him, becauſe he had juſt Cauſe to diſtrain for the Rent, and they appeared to the Court to be ſeveral.

1 Brnl. 179. 1 Ro. 450 Entre congeable, Br. 2. Poſt. 207. 7 Co. 28. b Hutt. 114. Mo. 358, 486. Hutt. 23. 11 Co. 45. a. Demand requiſite, where there is Forfeiture of a Pain. Ante, 82. 2 Cr. 618. 3 Cr. 383. Poſt. 135, 164, 207, 208, 331.

Wike

Debt.

(178) Wike *againſt* Wright.

Ante, 29, 130. Jones, 304. 2 Cr. 109, 186, 580. 1 Cr. 282.

Bill againſt an Attorney filed.

Poſt. 264, 281.

Wike brought a Bill of Debt againſt Wright an Attorney of the Court; and after Iſſue found for the Plaintiff, it was alledged, that there was no Bill to be found filed with the Cuſtos brevium, as it ought to be. And it was firſt queſtioned to be within the Equity of the Law of 18 Eliz. of Want of Original Writ; for the Bill is the Original in this Caſe: But upon that there was no Reſolution; for it was proved by Oath that there was a Bill, and that the Defendant had accepted it, and ſubſcribed it, and it was entred in hæc verba upon the Roll. And ſo the Court ordered that a new Bill ſhould be filed.

Treſpaſs.

(179) Weaver *againſt* Ward.
P. 14 Jac.

London. Brownl. One Train Soldier hurteth another by Miſchance in Skirmiſh Moor. f. 864. m° 2 Ro. 584. 3 Cr. 10. 11 H. 7. 23. Br. Corong. 220, 229. Br. Proclamation, 13.

Finch Ley. 8. Accord. 4 Co. 124.

Weaver brought an Action of Treſpaſs of Aſſault and Battery againſt Ward. The Defendant pleaded, that he was amongſt others by the Commandment of the Lords of the Council a trained Soldier in London, of the Band of one Andrews Captain; and ſo was the Plaintiff, and that they were Skirmiſhing with their Muſquets charged with Powder for their Exerciſe in re militari, againſt another Captain and his Band; and as they were ſo Skirmiſhing, the Defendant caſualiter & per infortunium & contra voluntatem ſuam, in diſcharging of his Piece did Hurt and Wound the Plaintiff, which is the ſame, &c. abſque hoc, that he was Guilty aliter ſive alio modo. And upon Demurrer by the Plaintiff, Judgment was given for him; for though it were agreed, that if Men tilt or turney in the Preſence of the King, or if two Maſters of Defence playing their Prizes kill one another, that this ſhall be no Felony; or if a Lunatick kill a Man, or the Like, becauſe Felony muſt be done Animo Felonico: Yet in Treſpaſs, which tends only to give Damages according to Hurt or Loſs, it is not ſo; and therefore if a Lunatick hurt a Man, he ſhall be Anſwerable in Treſpaſs: And therefore no Man ſhall be excuſed of a Treſpaſs (for this is the Nature of an Excuſe, and not of a Juſtification, prout ei bene licuit) except it may be judged utterly without his Fault.

There are three Degrees to avoid the Charge of a Treſpaſs: Inficiation, not Guilty. Juſtification, as *de ſon* Aſſault, &c. Execution, as this.

As if a Man by Force take my Hand and ſtrike you, or if here the Defendant had ſaid, that the Plaintiff ran croſs his Piece when it was diſcharging, or had ſet forth the Caſe with the Circumſtances, ſo as it had appeared to the Court that it had been inevitable, and that the Defendant had committed no Negligence to give Occaſion to the Hurt.

Debt.

(180) Coventry *againſt* Woodhall.
Hill. 13 Jac. Rot. 2588.

London. Goldsborough. 1 Brnl. 67. Winch. Ent. 269.

Apprentice ſent out of the Realm.

Coventry brought an Action of Debt againſt Woodhall for Twenty Pounds, the Condition was, that whereas one Rathborne had bound himſelf Apprentice to the Defendant for eight Years, the Defendant did Covenant with the Plaintiff, that he would retain, teach, keep and employ the ſaid Apprentice in his own Houſe and Service, in the Art of Chirurgery during the Term, and bound himſelf in Twenty Pounds for Performance of thoſe Covenants. And then it is ſhewed, that within the Term the Defendant ſent his ſaid Apprentice in a Voyage to Bantam in the Eaſt Indies, which he pleaded to be in the Company of other expert Chirurgions, the better to learn the Art; whereupon the Plaintiff demurred, and Judgment was given for him, for it was expreſly againſt this Covenant; for though the Covenant were not ſo reſtrained to the Houſe in Meaning, but that he might ſend his Servant or Apprentice in other Places about his Cures, yet he muſt be ſtill as one of his Houſhold coming and going, and in his Service, and not put over to any other; for, as I ſaid, the Matter of putting an Apprentice is a Matter of great Truſt for his Diet, for his Health, for his

his Safety; and therefore I will by Choice commit him to one, and not to another. And generally no Man can force his Apprentice to go out of the Kingdom, except it be so expressly agreed, or that the Nature of his Apprentice-hood doth import it, as if he be bound Apprentice to a Merchant-adventurer, or a Sailor, or the like.

(181) Pie *against* Thrill. Information.

PIe informed against Thrill upon the Statute of Recusancy, who pleaded, that he was indicted in Middlesex for the same Offence, and the Plaintiff said nul tiel Record, and Day given to the Defendant to bring in the Record; whereupon he took a Certiorari Justiciariis pacis out of this Court, and at the Day brought tenorem Recordi certified by Sir Thomas Lake Custos Rotulorum. And it was holden clear, that the Defendant did not need to take his Certiorari out of the Chancery, and so to bring it hither by Mittimus. But this Court might send this Certiorari immediately to an Inferior Court, and so are the Books 4 H. 6. 13. & 19 H. 6. 19. But if it were to certifie the Record it self, as upon a Writ of Error, or a Certiorari out of the Kings Bench to a Justice of Peace, which removes the very Record it self to hold Plea upon, there it were otherwise: But here the Certificate was disallowed, because it ought to have been made in the Name of the Justice of Peace, before whom it was taken, according to the Direction of the Writ, though the Custos Rotulorum keep the Records; and yet the Chief Justice of the Common Pleas alone certifies all Records upon Writs of Error, for the Writs are directed only to him. But it appeared after, that the plea was of a Conviction before the Justice of Goal-delivery, and so the Certiorari and all was Void; and yet because that it was the Award of the Court, it was not made as the Failer of the Record in the Defendant, though he had it not at the Day; but a Certiorari was awarded de novo to the Justices of the Goal-delivery.

1 Ro. 394.

1 Keb. 571. Record certified *per Custos Rotulorum.*

1 Ro. 395.

1 Syd. 64.

(182) Denny *against* Lemman. Treſpaſs.

DEnny against Lemman: The Case was thus, that the Copyholder brought an Action of Trespass against his Lord, for an House and an Acre of Land. The Defendant pleaded, that he had admitted the Copyholder, and had assessed a Fine of Twenty Nobles upon it, and had appointed him to pay it to his Bailiff at his House, being within the Manor, three Months after, and alledged that he had not paid it accordingly: Whereupon the Plaintiff demurred, and the Opinion of the Court was, that the Lord was not bound to aver or shew that the Fine assessed was reasonable, but it must come on the Copyholder's Side, to shew the Circumstances of the Case, to make it appear to the Court to be unreasonable, and so to put it upon the Judgment of the Court. For the Fine in Law is arbitrary, and is due to the Lord of Common Right: And it is only in Point of Excuse to the Tenant, if it be unreasonable, which the Court cannot Judge, but upon the Fact agreed: And the Copyholder, if he be a Defendant, may plead not Guilty; and then it shall come in Evidence whether the Fine were unreasonable or no. But yet the Opinion of the Court was against the Lord in this Case, because he had not laid a Demand of his Fine at the Time it grew due, or sometime after, of the Person of the Tenant, as the Lord must do in Case of Forfeiture of Copyhold, both for Rent and Fine. Cr. Jac. 617. Co. 3. 59. b. Ant. 82, 133.

Rolls Abr. f. 506, 507. 4 Co. 27. b. 28. a. 11 Co. 44. a. 29 Ass. 52.

Cr. Car. 196 In a Copyhold the Unreasonableness of the Fine must come on the Part of the Tenant. Post. 207, 208, 331. 3 Cro. 505. Note, Tr. 21 Jac. in C. B. it was adjudged, that the not Payment of Fine to the Lord was no Forfeiture of the Copyhold, unless the Fine be demanded, and a Denial of it.

Griffith

Devise. (183) Griffith Flood's Case.
Hill. 13 Jac.

Stat. of charitable Uses. Hernes Charitable Uses, 162.

"IN the Court of Wards was this Case: One Griffith Flood, a Doctor of "Law, being seised in Fee of Lands in the County of Cardigan by De- "vise Anno 1571. and in August 25 Eliz. devised the same unto Anne his Wife "for her Life, and after to Jane his Daughter for her Life, and after these "Lives ended, to the Principal, Fellows, and Scholars of Jesus College "in Oxford and their Successors to find a Scholar of his Blood from time "to time, and died." The Lives ended, Bridged Lloyd the Heir of Griffith Flood, being the King's Ward, entered. And upon a Case made hereof in the Court of Wards, and by Order of the said Court brought unto the Chief Baron and my self to be resolved; we agreed that the Devise was void in Law, because the Statute of Wills did not allow Devises to Corporations in Mortmain; but yet we held it clearly within the Relief of the Statute of Charitable Uses of 43 Eliz. under the Words limited and appointed. And so it was decreed, that the College should enjoy it against the Ward and his Heirs. And it was likewise held by us (and so is mentioned in the Decree) that the Proviso in the Statute, which exempts Colleges, is only intended to exempt them from being reformed by Commission, but not to restrain Gifts made to them.

11 Co. 70 & 73. 1 Co. 25. a.

Devise. (184) Collison's Case.
P. 15 Jac.

Hernes Charitable Uses, 149. Chaunc. Stat. 43 Eliz. of Charitable Uses.

COllison 15 H. 8. devised an House in Eltham in Kent to Lettice his Wife for Life, and after her Death made John Bricket and others Feoffees (as he called them) in the said House, to keep it in Reparations, and to bestow the rest of the Profits upon Reparation of certain High-ways there. Collison and his Wife are dead; and the House is descended to one Oliver Rolt an Infant. This Case, being in the Chancery between the Parishioners and Rolt, was referred by the Court to me and Tanfield: And we resolved clearly, that it was within the Relief of the Statute of 43 Eliz. for though the Devise were utterly void, yet it was within the Words (limited and appointed to charitable Uses:) Otherwise, if he were an Infant, Lunatick, or the like, that gave it, or that one appointed that, that were not his own to charitable Uses.

Inquisition. (185) Dimmock's Case.
Pasch. 15 Jac.

These came out of the Court of Wards to us.

A Deed of Bargain and Sale enrolled after Death of the Bargainee. 1 Brul. 33. Lane 35. Jenk. Cent. 299. 1 Cr. 217. 2 Cro. 408. m. Polt. 222. 1 Roll. 627. m. 27 H. 8. cap. 16. Cr. Car. 110, 218. Ow. 69, 149.

IT was found by Inquisition after the Death of Sir Henry Dimmock in Com. Warwick, 20 Decemb. 30 Jac. that one Bull and Wilcocks did by Indenture, dated 3 July, 31 Jac. bargain and sell the Manor of Pye to the said Sir Henry and his Heirs for Money, and that he died 4 Octob. 13 Jac. and after his Death, and not before, that is to say, 23 ejusdem Octob. the Deed was inrolled. And that Anne Dimmock was his Cousin and Heir, and of full Age; and that the Manor was holden in Chief. And it was resolved by Montague, Tanfield, and my self, that Anne Dimmock was to sue Livery; for we agreed, that this differed from all the Cases, that are put in Shillye's Case of Recovery for Fine Executory, Covenant to raise Uses, as in Wood's Case there, and the like, where the Estate vests in the Heir, though quasi Heir, that never was in the Ancestor; for this upon the Inrolment settles in Law, as between the Bargainer and Bargainee, ab initio, upon the Statute of 27 H. 8. of Uses, which doth join all the States to the Uses ipso facto: Only the Statute of Inrolment says, that in that Case it shall not vest, except the Deed be inrolled. So that if it be inrolled it doth vest, not by the Statute of Inrolments, but by the Stat. of Uses presently. Yet it was agreed, that the Bargainee cannot bargain and sell unto another, before his own Deed be inrolled, as was judged in Bellingham's Case.

1 Co. 99. a.

2 Inst. 675. Cr. Jac. 52, 53. Cro. 110, 218. Latch. 157. 2 Cro. 53, 409.

(186) Burcher's Caſe. Lunatick.

SIr Ralph Burcher being ſeiſed of divers Manors in the County of York holden in Chief died ſeiſed Anno 40 Eliz. and the ſame deſcended to William Burcher. Preſently after his Death it was found by his Office before Commiſſioners of the County of Middleſex, that the ſaid William Burcher was a Lunatick, and ſo had been long before the Death of his Father, and that he was ſeiſed of the ſame Manors; and the Queen granted the Cuſtody of him and his Lands to Sir Francis Barrington. After which, 42 Eliz. there was an Office found in the County of York, of the Seiſin of Sir Ralph; his Death, and Heir ut ſupra, and that he was of full Age; and we reſolved, the King was not to have any Mean Rates in this Caſe for Default of Livery ſued or tendered; becauſe no Laches could be imputed unto the Heir being Lunatick before, and ever ſince the Death of his Anceſtors, and the Laches of his Friends ſhall not hurt him. Otherwiſe it were, if at any Time he had been ſanæ memoriæ, ſince the Death of his Anceſtor. And there was ſhewed unto us the like Decree made Mich. 10 Jac. in the Caſe of one Vaughan, which Maſter Attorney of the Wards ſaid was made as a Decree of Equity; but we reſolved alſo, it was a good Decree in Law, upon the Reaſon aforeſaid; not becauſe the King had ſeiſed and committed by Force of the Lunacy, for that would have changed with the King's better Eſtate, for it is better for the King to hold for Default of Livery, than for Lunacy.

Jenk. Cent. 299. Lunatick ſueth not Livery; no mean Rates run againſt him.

And Livery was due to him, and the Law Preſumes that he would have ſued it being for his Benefit, if he had been *Compos mentis*.

(187) Edward *Earl of* Bedford *againſt* William *Biſhop of* Exeter, *and* Henry Wilſon *Clerk of the Church of* Buckland. Trin. 14 Jac. Rot. 2235.

Devon. Waller.

EDward Earl of Bedford brought a Quare Impedit againſt William Biſhop of Exeter, and Henry Wilſon Clerk for the Church of Buckland, and conveyed unto himſelf the Advowſon in Tail, and then ſhews, that he granted the next Avoidance unto one Walton, and others; and that the Church voided by the Death of Wheeler; and that the Grantee preſented John Hopkins, who was admitted, &c. and died, and ſo it pertains to him to preſent, and the Defendants diſturbed him. To this the Defendants pleaded, that before this Purchaſe, that is to ſay, in May 10 Jac. the Plaintiff did purchaſe a Quare Impedit againſt this Biſhop Defendant of the ſame Church; whereunto the Biſhop appeared, and the Plaintiff declared againſt him, and conveyed unto himſelf the Advowſon in Tail, and that the Church became void by the Death of Wheeler, and that he preſented John Hopkins, who was admitted, &c. and died, and ſo it pertains to him to preſent; whereunto the Biſhop Defendant imparled, and avers that it is the ſame Earl, the ſame Hopkins, the ſame Avoidance, and the ſame Diſturbance, whereupon both Actions are brought. And that the firſt Action depends, yet not diſcontinued, diſcuſſed, nor determined; and demands Judgment of this later Writ purchaſed (a little) whereupon the Plaintiff now declares, hanging his firſt Writ. The Plaintiff replies, that after the purchaſing of the firſt original Writ, that is to ſay, the ſixth Day of December Anno 12 Jac. the ſame Church being ſtill void, and he ſtill ſeiſed of the Advowſon in Tail (as aforeſaid) preſented one Henry Curtis his Clerk to the Biſhop, praying him, &c. who refuſed him, which is the Diſturbance, whereupon he now declares; and traverſes without that, that it was the ſame Diſturbance, whereupon both Actions were brought, and upon this the Defendants demurred in Law: And in the End of Eaſter Term 15 Jac. after ſome Argument at Bar before had, we all agreed, and I pronounced the Judgment, that this Writ ought to abate; for though there muſt be a Diſturbance naturally to maintain the Action, yet the principal Effect of the Suit is to gain and recover the Preſentation. And therefore for the ſame Thing you ſhall not have two Suits at once. And here was a Diſturbance laid

Quare Imped. cannot be brought hanging another againſt the ſame Defendant, and for the ſame Avoidance. Winch. Rep. 892. Hutt. 4. Noy 18. Poſt. 184.

Hutt. 4. Accord.

in the former Suit, and the Avoidance of the ſame; ſo that the new Diſturbance betters not the Caſe for the Plaintiff. Beſides, the Nature of a Quare Impedit is to be final upon Nonſuit or Diſcontinuance; but this Way were to defeat that; for the Plaintiff, not leaving his former Suit, may bring a new one. And by the ſame Reaſon, Twenty, which were an intolerable Vexation againſt Rule of Law; and the Adding of a new Defendant to the former amends not the Caſe; for ſtill there are two depending againſt one Man. Otherwiſe, if his firſt Quare Impedit were againſt Ten, by adding another to them he might have a new Quare Impedit, and ſo in infinitum; but he may have as many as he will againſt ſeveral Perſons.

Co. L. 139. a. 7 Co. 27. b.

Star-chamber. Ebor.

(188) *Sir* Stephen Procter *againſt* Darnbrook, *and others.* P. 15 Jac.

Bill in Star-chamber, hath ſhew of Felony.

IN the Star-chamber in a Suit between Sir Stephen Procter Plaintiff, Darnbrook, Armitage, and many others Defendants, for divers, but ſpecially for one horrible Riot committed by them all, in Beverly Moors about Lead-works and felling of Woods about them; becauſe it appeared upon the Hearing of the Cauſe in Part, that it was depoſed by divers, that one Wetheral (which was grievouſly hurt in this Riot) did die within three Months after: And being before an able Man ſaid, he would Charge one of the Rioters with his Death. By Order of the Court, we the two Chief Juſtices, together with the reſt of the Judges conſidered, whether it were fit to proceed here, and reſolved, that the Caſe appearing thus, it exceeded the Capacity of the Court, and was of dangerous Conſequence, though it were laid but a Riot in the Bill, ſince it fell out to be likely to be a Murder in them all by thoſe Proofs, the rather becauſe the Proofs were read by the Plaintiff himſelf, and his Interrogatory tended to that End, and he himſelf had proſecuted it as a Murder long ſince; and therefore we held it fit that he ſhould be ordered to prefer his Bill of Murder, and bring his Witneſſes together at the next Aſſizes, and there his Bill and Evidence to be given in open Court before the Juſtices of Aſſize to the great Inqueſt; and then if the Bill were found to proceed as for Felony, if not, to return hither again upon the Riot, and to be ſo heard.

Murder upon a Riot.

Ejectione.

(189) Anthony Morton *againſt* Thomas Orde, *and others.*

In Scaccario. Quo minus. 1 Bulſt. 58, 105, 129. 1 Brownl. 150. Jenk. Cent. 298. 2 Cro. 254. Yelv. 211 2 Roll. 604. 2 Cro. 21, 150. 1 Syd. 161. 3 Keb. 279. p. 30.

ANthony Morton brought an Ejectione firmæ againſt Thomas Orde, and others, for Land in Morton in the County of Durham, as Debtor to the King, Quo minus, &c. And the Defendant pleaded not Guilty, & de eo ponit ſe, &c Et præd. Anthonius ſimiliter Jo. fiat inde Jur. Et quia exit præd. ſuperius junct. per homines de viſne de Morton in Com. Dunelm. præd (ubi Breve Domini Regis non currit) & non alibi triari debent; Ideo quoad triandum illum Recordum loquela præd. mandetur Epiſc. Dunelm. & ipſe ulterius mandet Juſtic. infra libertatem illum idem Recordum, ita quod illum habeat ad prox. Curiam apud Dunelm præd. prox. tenendum, poſtquam idem Recordum ſibi deliberatum fuerit ad verificationem præd exit. ibidem faciendum, & dies dat. eſt tam querenti quam defendenti tunc ibm. &c. Et cum verificatio exitus ibm. fact. fuerit quod tunc præd. Epiſcopus Recordum loquelæ, præd. cum toto eo quod in præd. Curia prox. fact. fuerit Baronibus hic mittat ad certum diem quem iidem Juſticiarii partibus præd. in eadem Curia hic præfigant. And then follows the Biſhop's Certificate thus, Ego Gulielmus Epiſcopus Dunelm. Baronibus de Scac. certifico quod ſecundum tenorem brevis Domini Regis de Mittibus mihi direct. & huic Recordo annex. ad Curiam Domini Regis tent. apud Dunelm die Lunæ 26 Julii Anno Regni Regis Jac. 11. coram me præfat Epiſcopo, Jac. Altham, & Ed. Bromley, &c. Juſticiariis Dom. Regis in Com. Dunelm & Sadberg exiſten. prox. cur. &c. Poſtquam idem Recordum mihi deliberatum fuit, mandavi idem Recordum eiſdem Juſticiariis Dom. Regis ad verificationem exit. &c. And then ſhews, that the ſame Day the Parties came, and the Plaintiff prayed ſibi fieri, quod lex ſuaderet, &c. And Commandment was given to the Sheriff, quod venire fac. ad horam primam poſt

County Palatine of *Durham*, Trial there out of the Exchequer, and Certificate from thence.

poſt meridiem ejuſdem Dei, duodecim, &c. And that then the Parties came, and the Sheriff returned his Writ ſerved with a Pannel; but the Jury came not, and ſo it was continued by Habeas corpora from Day to Day 'till the 8 of Auguſt, Anno 12 Jac. and then the Jury paſſed and found the Defendants Guilty, and aſſeſſed Dammages and Coſts, and the Juſtices preſixed a Day to the Parties in Octab. Mich. tunc. prox. futur. coram Baronibus, &c. Ad quem diem ego præfatus Epiſc. Recordum præd. cum toto eo quod inde in dicta cur. apud Dunelm. fact. fuit Baronibus, &c. juxta tenorem brevis, &c. mitto. Whereupon Judgment was given for the Plaintiff, and a Writ of Error brought, and one Error was aſſigned; that it was not confeſſed that the Cauſe could not be tried but at Durham, as it is uſed in Caſes of Challenge by the Plaintiff to the Sheriff, to remove it to the Coroner. But it was anſwered, that that was Matter of meer Surmiſe, and therefore required the Confeſſion of the Defendant; but this was Matter apparent to the Court, and therefore the Court Ex officio did Award the Writ ut ſupra. But the chief Error whereupon it was inſiſted was, that the Mittimus is to the Biſhop ut ipſe ulterius mandet Recordum Juſticiariis, &c. Now it appears by his Certificate, that he was one of the Juſtices himſelf, ſo that he could not ſend the Record to himſelf; and indeed this Certificate varied from former Precedents, which did never mention that the Biſhop was a Juſtice himſelf.

Authority and Intereſt in one Act. Deut. 87.

Now this appears to be the Practice ever ſince the Stat. of 27 H. 8. which took from the Biſhop, and gave to the King the Making of the Juſtices there. But yet notwithſtanding the Form of the Mittimus is continued to the Biſhop, that he ſhould ſend to the Juſtices as before; only they are now called the King's Juſtices, which they were not before. And it ſeems that the Mittimus might well enough, upon the Statute 27 H. 8. have been directed to the Juſtices themſelves immediate; and yet this Way alſo may be good, becauſe the Statute directed no Alteration in that Point, and the Precedents have continued ſo; now it appears alſo, that the Biſhop is the firſt Man in Commiſſion with the Judges ever ſince the Statute, for Honours ſake, ſo that the Subſtance of Certificates have ever been in Effect, as now this is; ſaving that the Biſhop hath not named himſelf a Juſtice expreſly, as in this he doth. Hereupon Montague Chief Juſtice, and my ſelf, after hearing of ſome Arguments reſolved, that the Certificate was well enough, and that the Words mandavi Recordum Juſticiariis, was no more in Effect, but habui Recordum coram Juſticiariis, which was true. And he brought the Record into the Court, holden before himſelf and other Juſtices. And thought the Proceedings were not all ad prox. cur. but upon many Adjournments it was well enough: But the Record muſt be delivered into the Court next after it is received, and then to proceed as it may; for all cannot be finiſhed at the firſt Court, and ſo we reported to the Lord Keeper, and Lord Treaſurer in the Exchequer Chamber, and ſo Judgment was affirmed.

Cap. 24.

2 Cr. 254.

(190) Norris *againſt* the Hundred of Gawtry.
Hill. 14 Jac. Rot. 431.

NOrris brought a Writ upon the Statute of Hue and Cry againſt the Hundred of Gawtry, and the Robbery was laid as it was indeed, 9 Octob. 13 Jac. And the Teſte of the Writ was 9 Octob. 14 Jac. And after a Verdict for the Plaintiff, it was moved by Harvy that the Writ was not brought within the Year after the Robbery committed, which are the very Words of the Statute 27 Eliz. And it was agreed, that in the Caſe of Protection the Year ſhould be counted from the Day of the Date: And ſo in Deeds enrolled, the Day of the Date ſhall not be counted any Part of the ſix Months. And Juſtice Warburton held it ſo alſo in this Caſe. But Juſtice Winch and I were of a contrary Opinion, in Caſes that depended not upon Writings dated, but upon Time to be reckoned from Acts done, as in this Caſe from the Robbery committed, which muſt be confeſſed, was done upon the ninth of October, 13 Jac. and there cannot be two ninth Days of

Leiceſter. Mo. 878. 1 Brnl. 156. Cap. 13.

5 Co. 1. b. 1 Leo. 184.

October in one Year, and he might have brought this Action the ſame firſt Day without doubt. And though it is true, that a Deed may be inrolled the very Day of the Date, yet that is by Reaſon of the Intent of the Law, and not by the Letter. If a Leaſe be made, from the Making of the Leaſe it takes Effect preſently the ſame Day, whether it be dated or no: So if the Bargain and Sale be not dated, the ſix Months muſt be reckoned from the Delivery. And though the Party robbed deſerve Relief and Pity, yet againſt the Hundreds, which are Innocent, it is a very Penal Law; and ſo the Plaintiff could not have his Judgment.

11 Eliz. Dyer 286. *Ejectione Firmæ.* 5 Co. 1. b. Accord. Co. L. 46. b. Dyer, 218. b.

Caſe. (191) Thornton *againſt* Jebſon.

Hill. 14 Jac.

THornton brought an Action of the Caſe againſt Jebſon, and ſaid, that where he was a Carrier, and a Man of honeſt Fame, that the Defendant had ſaid of him, that he was a common Barreter. Now we were of Opinion, that if thoſe Words were ſpoken of a Juſtice of Peace, or publick Officer, or of an Attorney or the like, that they would bear an Action.

1 Cr. 228. 3 Cr. 171. Hetl. 139. Mo. 180. 1 Roll. 59. Yelv. 90. Accord. Common Barreter. 1 Cro. 191. 2. Adjournment. 1 Roll. 59

(192) De Termino Sancti Mich. Anno 13, 14 Eliz.

BEndloes dd. l'opinion del Court in ceſt cas; Roy ſeiſe d'un Manor, a que Advouſon eſt appendant, eſtrange preſent, & ſon Clerke eins per ſex mois nient conuſant al Councell le Roy, & puis le Roy per ſes Lettres Patents grant le Manour ou el Advouſon a eſtrange l'Incumbent devy ſi le grantee poit preſent eſt le Queſtion, & fuit tenus per Curiam que il poit, car l'Advouſon fuit touts dits, appendant & le inheritance de ceo paſſe al grantee. Car ſi common perſon ſoit ſeiſe d'un Manour a que Advouſon eſt appendant & eſtrange preſent, & ſon Clerke eſt eines per 6 mois ore l'Advouſon eſt diſappendant tan que l'autre ad recontinue ceo per breve de droit l'Advouſon mais neſt iſſent in le cas del Roy, car homme ne poit mitter le Roy hors de poſſeſſion per preſentment ou uſurpation; mais le patentee ne avera, Quare Imped. del premier diſturbance, car ceo remain in le Roy pur ceo que le Roy n'ad donne ceo eſteant choſe en Accon. ſi non que il fait aſcun mention de ceo en ſon grant. Et fuit agree que le patentee avera le prochein Avoidance, & en Quare Imped. ſerra ſon title per le darreine preſentment de Roy ſans faire mention de preſentment del eſtrange.

4 Le. 118, 269.

V. 16 E. 3. *F. Quare Imped.* 67. Mo. 338. Poſt. 242.

Uſurpation upon the King, yet he may grant the Advowſon. Godb. 7. pl. 10. Yelv. 91. Accord. 6 Co. 30. a. 2 Cr. 52, 123.

(193) Commendam Caſe.

Q. Imped.

John Colt & Glover *againſt the* Biſhop *of* Coventry & Lichfield.
Mich. 10 Jac. Rot. 2642.

JOhn Colt and William Glover bring a Quare Impedit againſt Richard Biſhop of Coventry and Lichfield, of a Preſentation to the Church of Clifton Camvill; and declared, that one John Standley Eſquire was ſeiſed of the Manor of Clifton Camvill and Hampton, with the Appurtenances, to which the Advowſon did belong, and died ſeiſed, and it deſcended unto Elizabeth and Iſabel his Daughters and Heirs, and then bringeth the Manor and Advowſon to Herſey and Moyle, by whom the next Avoidance, 4 E. 6. was granted to three. And then that whole Avoidance came to one of thoſe three, ſcil. to Geoffery Walkenden; then the Church avoided by the Death of Humfrey Standley Incumbent. And ſo Geoffery Walkenden preſented William Walkenden, who was admitted, inſtituted and inducted; and then bringeth down the whole Manor and Advowſon to Walter Henningham, &c. And Henningham entred into the whole Manor, cum pertinentiis ad quod, &c. and was ſeiſed in Tail, and ſo ſeiſed poſtea ſcil. 11 Jac. made a Grant of the next Avoidance unto Colt and Glover the Plaintiffs, and then the Church avoided by the Death of William Walkenden the Incumbent; and ſo it belongeth to the Plaintiffs to preſent, and avers the Life of Walter Henningham the Grantor.

Moor, f. 898. 1 Ro. R. 451. p. 1. Jenk. Cent. 300. Winch Ent. 667, & 676. Latch. 249. 21 H. 8. cap. 13. Strafford. The great Caſe of the *Commendam* in the Chequer-chamber, adjourned thither out of the Common Pleas.

The Defendant confeſſeth all the Conveyance of the Advowſon, and the firſt Grant of the Avoidance by Herſey and Moyle, and the Death of Stanley the Incumbent and the Preſentation of William Walkenden, and that he was admitted and inſtituted accordingly. But then he pleaded the Stat. of 21 H. 8. of Pluralities; and that Clifton Camvill was a Benefice with Cure, and above 8 Pounds per Annum, and that William Walkenden in December 3 Eliz. took the Benefice of Yelvertoft in the County of Northampton, and was therein admitted, inſtituted, and induced. And ſo Clifton Camvill became void, and remained void Eighteen Months, and ſo it accrued to the Queen by Lapſe to preſent, and then the Queen died, and ſo it doth belong to the King to preſent, and then pleaded the Statute of 25 H. 8. of Diſpenſations at large, giving Power of Diſpenſation to the Archbiſhop of Canterbury, and in the Vacation to the Guardian of the Spiritualties; and then pleadeth, that in November, 1610. the Dean and Chapter of Canterbury being Guardian of the Spiritualties, the See of Canterbury being void, after examination of the Cauſes and Qualities of the ſaid Biſhop then of Rocheſter, now Elect of Coventry and Lichfield, reciting by their Letters Patents of Diſpenſation the Petition of the Defendant then being Biſhop of Rocheſter, and Elect Biſhop of Coventry and Lichfield, wherein it was alledged, that the ſaid Biſhoprick of Coventry and Lichfield was void, this before was Inſufficient; and that he held already the Rectory of South-fleet in Kent in Commendam with his Biſhoprick of Rocheſter. And therefore to provide for a Biſhop's State, and, that it ſhould not be vilified, did Grant, inter alia, ut Rectoriam de South-fleet, nec non ut unum aliud, vel plura Curata, vel non Curata, Beneficia Eccleſiæ infra Regnum Angliæ, cujuſcunque nominis, qualitatis, aut dignitatis in Commendam itidem obtinere, acceptare, & recipere; ac propria ſua Authoritate capere & apprehendere; ac realem, actualem, & Corporalem poſſeſſionem ejuſdem abſque Inſtitutione, Collatione, Inductione vel alia quacunque Juris Solennitate, intrare, ac omnes Decimas, proficua, &c. quamdiu viveret, & dicto Epiſcopatui Coventry & Lichfield præeſſet, in Commendam tenere, poſſidere, & habere, & in ſuos proprios uſus, & utilitatem convertere; ac de eiſdem omnibus, & ſingulis integre, ac pro ſuo arbitrio, libere & licite diſponere poſſit, in tam amplis modo & forma, & effectu, ac ſi Epiſcopatum non fuiſſet aſſequutus, ac ſi eadem in titulum Canonicum ac cum legitima diſpenſatione poſſideret, ac in eiſdem debitam & perſonalem Reſidentiam faceret: Ac ſicuti veri Rectores & Incumbentes convertere poſſent, licet non faceret Reſidentiam. And then grants him like Power, pro arbitrio ſuo, to reſign and change, and others in their Place propria ſua Authoritate capere, apprehendere, &c. ut ſupra. And then diſpenſeth with Non-reſidence, that he ſhould not by any means be compelled unto it, quantum in ipſis fuit, & jura regni paterentur; Canon. decretis, conſtitutionibus localibus Stat. ſive Ordinationibus Eccleſiaſticis generalibus, vel ſpecialibus, etiamſi juramento Religionis, vel quovis alio modo confirmatis, vel corroboratis, in contrarium non obſtantibus. Provided that all his Benefices of all Sorts ſhould not exceed two Hundred Marks in the King's Books. And provided, quod Beneficia prædicta obtenta vel obtinenda debitis non fraudentur obſequiis. And then he pleadeth the King's Confirmation ordinary, 8 Jac. per literas ſuas ſigillatas juxta prædictum Actum, &c. That he ſhould enjoy all Things contained in the Diſpenſation, ſecundum vim, &c. earundem and the Inrolment of the Diſpenſation, and then averreth, that the Caſe of this Diſpenſation was not Repugnant to the Law of God. And that like Diſpenſations were uſed to be had at Rome, before the Making of the ſaid Act by Biſhops, Subjects to King H. 8. And that the ſaid Diſpenſation was not againſt the Statute of 21 H. 8. of Non-reſideney. And then he ſhews, that he was made Biſhop of Coventry and Lichfield 6 Decembris 8 Jac. concurrentibus his, &c. And then, that the King ratione prærogativæ ſuæ Regiæ, per lapſum temporis ſibi devoluti, by his Letters patents under the great Seal of England, dated 27 Martii 10 Jacobi, ad prædictam Eccleſiam de Clifton Camvill per lapſum temporis vacantem, & ad ſuam præſentationem ſpectantem præſentavit eundem Epiſcopum, eandemque Eccleſiam ei commendavit; Ita quod eidem Epiſcopo bene liceret dictam Eccleſiam in Commendam obtinere, & propria ſua Authoritate capere, & apprehendere; ac corporalem poſſeſſionem ejuſdem abſque Inſtitutione Collatione, Inductione, vel alia quacunque Juris ſolennitate intrare;

Cap. 13.

Cap. 21.

The *Commendam.*

Non obſtante.

Conditions.

Averments.

The King's Preſentation.

intrare; ac Decimas & Proficua ejuſdem quamdiu viveret & dicto Epiſcopatui præeſſet in Commendam tenere & habere, juxta & ſecundum vim, formam, effectum, & tenorem dictarum literarum diſpenſationis licentiam conceſſit. Ad quam rem ad debitum effectum producendam, Dominus Rex per dictas literas ſuas Patentes Regiam ſuam ſupremam Authoritatem, tam in ſpiritualibus, quam in temporalibus, prærogativam ſuam Regiam adhibuit, Virtute quarum quidem literarum diſpenſationis, & ſpecialium Literarum Patentium Domini Regis, idem Epiſcopus, 28 Martii Anno Decimo prædictam Eccleſiam de Clifton, &c. in Commendam acceptavit, & intravit; atque eam ſemper poſtea hucuſque in Commendam habuit, & habet, abſque hoc quod prædicta Eccleſia de Cliſton, &c. vacavit per mortem prædicti Guilielm. Walkenden prout, &c. unde petit judicium, &c.

Other Averments. **Then the Averments in the ſecond, that he remains Biſhop of** Coventry **and** Lichfield; **that he had no other Benefice with Cure at the time of the Diſpenſation, but** South-fleet. **That** Clifton **is a Benefice with Cure, and that that Church is not defrauded of his Dues, ſpeaking nothing of** South-fleet, **to which the Proviſion for the Cure did alſo extend.**

That he never had more Benefices than two with Cure, ſince his Diſpenſation; and that the yearly Value of all his Benefices, quæ jam retinet. (**Note, he ſays not, or ever had: So the Condition might be broke before**) **exceeds not two Hundred Marks.**

Replication. **The Plaintiff** proteſtando, **that** Walkenden **did not except** Yelvertoft. **Alſo that ſuch Diſpenſations were not had at** Rome **for Biſhops King** Henry **the Eight's Subjects, before that Act, prays** Oyer **of the Diſpenſation, Confirmation and Preſentation ſo called.**

And then demurs prout modo & forma.

There was never Judgment in Law paſſed upon this Kind of Commendam, **though it hath heretofore received ſome Onſet; and therefore it ſtood with the Gravity of the Court of Common Pleas to adjourn it to the Exchequer chamber, as to the general Council of Law, to receive here a definitive Sentence. Ten Judges have already delivered their Opinions, what Judgment they would adviſe to be given in the Common Pleas upon this Caſe. Of which Ten two, that is to ſay,** Baron Altham **and the Chief Baron, have holden the** Commendam **to be good in Law, and that the Commendatories Plea is good. And of the ſame Opinion was** Montague **the Chief Juſtice, that the** Commendam **was good, notwithſtanding any Exception; and that either upon the Statute or by the King's diſtinct Act, as conſiſting of it ſelf. And that therefore Judgment ought to be given for him, that is, for the Defendant. Two others, that is,** Juſtice Doderidge **and** Winch **were of Opinion, that Judgment ought to be given neither for the Plaintiff nor for the Defendant, but for the King; yet they condemn the** Commendam, **as void in Law. The other ſix have alſo condemned the** Commendam, **but they have concluded that Judgment ought to be given for the Plaintiff, and neither for the Defendant nor the King; and of the ſame Opinion am I, that Judgment ought to be given for the Plaintiff.**

Now to the Caſe, which I divide into four main Queſtions, whereof three are between the Plaintiff and the Defendant. And the fourth is between the King and both Parties, Plaintiff and Defendant.

The firſt main Queſtion. **The firſt Queſtion is, Whether this** Commendam **be good in Law upon the Statute of** 25 H. 8. cap. 21. **by which Statute it muſt ſtand or fall, being grounded upon it, and made in this Form; that is to ſay, either by the Archbiſhop of** Canterbury, **or in Vacation by the Dean and Chapter, as this is, with the King's ordinary Confirmation appointed by that Act. And I hold, that this** Commendam **thus conſidered is void in Law.**

The ſecond main Point. **The ſecond Queſtion is, Whether the ſeveral and diſtinct Acts of the King by his ſecond Letters Patents (here called his Preſentation) being more than is required by the ſaid Act of** 25 H. 8. **upon Conſideration of all the**

Parts

Parts of it, do amount to an immediate Commendam made by the King himſelf Subſtantive, ſtanding of it ſelf; or do ſo depend upon the former Commendam of the Dean and Chapter, as if that fell, this muſt fall too. And in this I hold, that it is not a Primary or Subſtantive Grant; but is in it ſelf, and the King's Intention, ſo dependent upon the other, that it muſt ſtand or fall with it.

The third Queſtion is, Whether this Commendatory be ſuch a Poſſeſſor of the Benefice, as may be by the Statute of 25 E 3. cap. 7. or by the Common Law, interplead with the Patron Plaintiff in the Quare Impedit. And to this I hold him not enabled. The third main Point.

The fourth main Queſtion is, Whether upon this whole Record Judgment ought to be given neither for the Plaintiff nor Defendant, but for the King, upon Opinion that the Plaintiff by demurring upon the Plea of the Defendant, hath confeſſed the Lapſe of the Church, and the Title of the King, as the Defendant's Plea imports. And in this I hold, that upon the whole Matter there is no Warrant in Law to give Judgment, or award a Writ to the Biſhop for the King in this Caſe.

There is a fifth Point that in this Caſe meets with a Man's Imagination, that is, How it ſtands with the King's Lapſe, ſtill being true, as it is pleaded; that is, whether it remain not ſtill ſo to the King, as he may preſent anew; as it is ſaid he hath preſented Overall the now Biſhop of Coventry and Lichfield, who is inſtituted and inducted upon it. And whether the ſame Biſhop ſhall not retain the Benefice, notwithſtanding the Judgment ſhould be given for the Plaintiff, and a Writ awarded to the Biſhop for him.

But this Queſtion comes no way in Judgment now, and what is worſe, it may come in Judgment before my ſelf and Brethren hereafter; and therefore I will not prejudge any Thing, but reſerve my Opinion in this Point to the due Time, and ſo proceed to the Caſe upon this Record.

Before I enter into the Main of the Caſe, I will munire viam fence out my Way, ne quæſtiones alienæ, ſtrange Queſtions break into my Argument. Therefore I will ſtate the Queſtion ſingle, that we may Reaſon ad idem, which we ſhall never do, if there be not an idem certain; for multiplex indiſtinctum parit confuſionem, and Rogationes, Quæſtiones, & Poſitiones debent eſſe ſimplices. Therefore I will exclude Variety either in Matter or Nomination.

And firſt I declare, that the King's immediate perſonal originary inherent Power, which he Executes, or may Execute Authoritate Regia ſuprema Eccleſiaſtica, as King and Sovereign Governour of the Church of England, which is one of thoſe Flowers, quæ faciunt Coronam, which makes the Royal Crown and Diadem in Force and Virtue, is not (as I ſhall hereafter ſhew) in Queſtion in this Caſe. But the Queſtion is only of Power given to the Archbiſhop, or Dean and Chapter by the Statute, and the true Meaning of it, concerning Faculties and Diſpenſations, which I call Authoritatem ordinariam limitatam & delegatam. The Word in the Statute is to Authorize Perſons, &c.

Secondly, we have nothing to do with a Commendam retinere, which indeed is no Commendam, though it be ſo commonly called; but is only a Faculty of Retention and Continuation of the Benefice in the ſame Perſon and State wherein it was, notwithſtanding ſomething intervening, as a Biſhoprick, or the like; which without ſuch a Faculty would have avoided it. So a Commendam it is not, for my own Benefice cannot be commended unto me; therefore no Argument taken from Allowance of a Commendam ſo called of that Kind, ſcilicet to retain, can warrant this that we have in Hand.

A third Obſervation, which amounteth to an Excluſion alſo is, that this Commendam, which we have in Hand, is not Commenda perpetua (which can be no leſs than for the Life of the Commendatory abſolute) which this is not, but ſo long as he ſhall live, and remain alſo Biſhop of Coventry and Lichfield.

So

The true Queſtion ſtated touching the *Commenda.*

So then our ſingle Queſtion ſingled and ſtated is, Whether a Commenda of the Tenour and Form that this is, having the Clauſes that this hath, and wanting ſome others which this wants (as they appear in the Record, and as I ſhall obſerve and enforce them after diſtinctly in my Argument) made by an Archbiſhop of Canterbury, or Dean and Chapter, (with the King's ordinary Confirmation, according to the Statute) to a Biſhop, to take Benefices de novo, to the Value of two Hundred Marks in the Tax of the Exchequer, with Cure or without, and to hold them and their Fruits for a Time limited, more than ſix Months, and leſs than for Life, be warranted by Statute of 25 H. 8. and the true Meaning of it.

Commenda Quotuplex, & qualis. Dav. 76.

Commendams are of three Degrees, one ſemeſtris, another perpetua vel ad vitam, a third, intermedia, or diuturna, ſed limitata, which is called ſometime temporaria, or temporalis, or ad certum temporis ſpatium limitata, as ſhall appear in the Canons after.

The Commenda ſemeſtris grew out of a natural Equity, that in the Time of the Patron's Reſpite given him to preſent, the Church ſhould not be without a Provifional Paſtor, which was a Law of Neceſſity agreeable to the Law of Nature. And this might upon the ſame Reaſon be continued with Revenues ſo long as the Patron's Reſpite laſted, as to ſix Months after Notice, in this Caſe or the like. But after the Lapſe juſtly incurred, the Commendam is to ceaſe; or then the Ordinary may collate, for natura appetit perfectum, & Bonum neceſſarium extra terminos neceſſitatis non eſt Bonum. Poſt. 159. 18 Ed. 3. 21. & 1 Hen. 7. 21. the Biſhop may ſequeſter, if the King preſent not: And 12 H. 8. 8. by Pollard the Biſhop muſt ſee the Cure ſerved, if the Perſon fail, at his own Coſts. And Lindwood de jurejurand. cap. Presbyt. verbum oblationis. If a Biſhop celebrate Divine Service in any Pariſh of his Dioceſs, he may require the Offering of that Day. And upon the ſame Reaſon, if the Executors, being called by the Ordinary, will not prove the Will, the Ordinary may commit the Adminiſtration 'till he do it, 4 H. 7. 13. 10 H. 7. 18. and 7 E. 4. 12. Letters ad Colligend. &c.

Of *Commenda*'s of all Sorts out of the Canons, and the like.

Now out of the Cannon Law and Doctors concerning Commendams of all ſorts, Concilium Chalcedonenſe ſub Leone, Anno 451. cap. 13. Statuit Clericum in duarum Civitatum Eccleſiis, eodem tempore conſcribi non oportere, cauſa 21. quæſtio 1. in principio cap. Cleric.

Synodus 7. cap. 15. Anno 789. ſub Adriano in Concilio Nicæno ſecundo quæſtio 1. in principio cap. Clericum prohibet in duabus Eccleſiis aliquem connumerari, negotiationis enim eſt, & turpis lucri proprium, & ab Eccleſiaſtica conſuetudine penitus alienum. Audivimus enim ex ipſa Dominica voce quod nemo poteſt duobus Dominis ſervire, & hoc quidem in hac Civitate. Cæterum in villis quæ foris ſunt, propter inopiam hominum indulgeatur: Leo quartus Anno 487. cauſa 21. quæſtio 1. cap. Qui plures: ſcribit, qui plures Eccleſias retinet, unam quidem titulatam, aliam vero ſub commendatione tenere debet; Et per la gloſſ. de Commendam non eſt prælatus, ſed potius Procurator; & qui Commendavit revocare poteſt quando vult. Dav. 79. a.

Note, that this makes Titulum, & Commendam, membra dividentia, and was but an Evaſion out of that good Law; except it be taken of the Semeſtris.

Evidens utilitas & urgens neceſſitas Eccleſiæ ſemeſtris. Dav. 76. a. 79. a.

Gregorius 9. Anno 1227. Nullus poterit plures Eccleſias parochiales obtinere, niſi una pendeat ex altera; vel unam intitulatam, alteram vero commendatam habuerit, Cap. Duram 54. de Electione. Again membra dividentia.

Gregorius X. in Concilio Lugdunenſi generali Anno 1275. (mark how Late it Continues) Nemo deinceps parochialem Eccleſiam alicui, niſi in ætate legitima & Sacerdotio conſtituto Commendare præſumat; nec talem etiam niſi unam, & hoc evidente neceſſitate, vel utilitate ipſius Eccleſiæ ſuadente. Hujuſmodi autem Commendam, ut permittitur, rite factam declaramus ultra ſemeſtris temporis ſpatium non durare ſtatuentes, quicquid ſecus de commendis Eccleſiarum parochialium actum fuerit eſſe irritum ipſo Jure. Cap. Nem. 15. de Electione in ſexto. Note, that this is the the laſt, either General Council, or Popes Decree, or Decretal, which gives Leave to Commendams.

In the Gloſs upon this it is ſaid, that the Conſent of the Patron & omnium, qui lædi poſſunt, muſt be had, and that he is not Prælatus but Procurator, Adminiſtrator

Adminiſtrator & habet titulum Canonicum. It doth not make fructus ſuos, but adprovidendum ſibi & Miniſtris, & quod ſupereſt in utilitatem Eccleſiæ convertend ſed non obligat, dum Papam cum ſeipſo obligare non poſſit, & ideo Papa poteſt in perpetuum commendare. I find not this Part for the Pope's Power. Dav. 76. a.

Clement V. Extravag. Com lib. 3 tit. de Præbendis & dignitatibus Cap. 2. Ex certa ſcientia ex nunc revocamus, caſſamus, &c permiſſiones per nos factas, per quas Epiſcopatus, Eccleſias, & Monaſteria, ſub Commenda vel Cuſtodiæ, ſeu Curæ vel Guardiæ aut adminiſtrationis titulo, vel nomine duximus perpetuo, ad vitam, ſeu ad certum temporis ſpatium committend. Proſpeximus enim demum in debilitate ægritudinis conſtituti, & à negotiorum diſcuſſione ſemoti. 1. Quod Eccleſiarum earundem cura negligitur. 2. Bona & jura diſſipantur. 3. Subjectis perſonis & populis ſpiritualiter, & temporaliter injuriatur. 4. Iiſque redundant ad noxam quæ dicebantur cedere ad profectum. *Commenda Synonyma.*

Conſtitutio Othoboni, Anno 1248. De Commendis Eccleſiarum. Sane inter adinventiones eorum, qui fraudes contra ſuas animas moliuntur, hanc maxime comperimus Divini & Humani juris præſidia confundentem, quod cum una Eccleſia unius debeat eſſe Rectoris, ſicut & ratio dictat, & multiplicis Juris Statuta declarant: Quidam tamen rationis expertes, vel Juris Regulas comtemnentes, dum ad plurium Eccleſiarum occupationem velamen aliud non habentes, quoquo modo ditari feſtinent, vacantes ſibi Eccleſias commendari procurant, amplectentes Juris verba, non ſenſum, quod aliquando permittit unam haberi Eccleſiam intitulatam, & alteram commendatam: Et cum juxta ſanum intellectum propter neceſſitatem, vel utilitatem vacantis Eccleſiæ, jus commendationis, non tam præceptorie quam permiſſive fuerit introductum, &c. univerſas Eccleſiarum Commendas hactenus quibuſcunque factas (niſi ex evidenti utilitate unius tantum Eccleſiæ commendatio facta ſit) penitus revocamus.

Johannes de Athona upon this Canon dicit, quod commendare, idem eſt quod deponere, ſeu cuſtodiæ committere. Et dicunt omnes, quod non eſt Prælatus, ſed Procurator. Habet tamen legitimam adminiſtrationem ad Colligend. Et providend. Miniſtris; ea vero quæ ſuperſunt ad utilitatem Eccleſiæ convertend. Et conſenſus patroni requiritur ſecundum omnes, quod ſatis obſervant Prælati; qui aliis, quam præſentatis per patronos non faciunt Commendas. Dav. 75. b. 76. b.

Et Conſtitutio Peccham Lindwood de Præbendis limit. Commendam ad Conſtitutionem Gregorianam Lugdunenſem, ſupra. Which was the moſt exact.

Gregorius ſecundus Lib. 2. Epiſt. 13. ad Angelum Epiſcopum ſcribit, qui antea Fundorum erat Epiſcopus, quod cum ea civitas ab hoſte eſſet vaſtata, Tarracenæ eum conſtituit Sacerdotem, ſic tamen ut Fundenſis Eccleſiæ ſibi Jura poteſtatemve nullo modo ſubtraheret, cauſa 21. Queſtio 4. cap. ult. & penult. Gregorius Luſitaniæ Eccleſiæ captivatæ ipſum Johannem Cardinalem, in Sillatina Eccleſia, conſtituit Sacerdotem, quam paſtore vacante gubernarit, ita tamen ut ſi Lucitan' ab hoſtibus liberari contigerit, ad eam reverteret. Unde Gloſſa facit queſtionem, ſi inſtitutio poſſit eſſe ſub conditione, & diſputatur varie, ſic tamen ut Papæ hoc concedi putat: Cauſa 7. Queſt. 1.

Rebuffus de Commendis dicit; quod Papa in Commendis opponens hanc Clauſulam, quod liceat de fructibus diſponere, facit ut tum impetrans lucretur fructus, nec tenetur rationem reddere quemadmodum, ſi haberet Titulum. Et quamvis commenda non poteſt permutari cum titulo, tamen in Francia obſervamus contrarium, quia reputamus Commendam verum titulum, & ſic permutari poſſit.

Et Commenda ad vitam alicujus facta, ſive ad Eccleſiæ ſive perſonæ utilitatem, non poteſt ſine cauſa revocari, ſicut nec collatio facta in titulum.

Et Rebuffus de praxi, Beneficiorum fol. 135. Per mortem Commendatorii perpetuo Beneficium vacat non ut prius, & hæc eſt praxis in Francia, Commenda perpetua permutari poteſt cum titulo, quod ſæpe vidi in Francia, & confert, locat, & omnia facit ſicut habens titulum; & Commenda perpetua non poteſt revocari. Dav. 83 b.

Et Gomes in Regula de triennali poſſeſſore (Dub. de titulo) perpetua Commenda eſt ampliſſima diſpoſitio: Et eſt verus et legitimus titulus, cujus ſigna ſunt perpe-

tuitas & fructuum diſpoſitio, quæ duo concurrunt in perpetua Commenda, Et poteſt locare omnia bona Eccleſiæ, & talis Commenda poteſt permutari, &c. Et eſt inſtar Collationis, & Reſervatio Papæ vacat per Commendam perpetuam ſicut per Collationem; ſecus per temporalem.

Of the Power of diſpenſing in general.

So much of Commendams out of the Canon Law: Yet before I proceed to the Argument of this particular Caſe, I will ſay ſomething of the Power of Diſpenſing in general.

For the King.

And firſt I hold clear, that though this Statute ſays, that all Diſpenſations, &c. ſhall be granted in Manner and Form following, and not otherwiſe; that yet the King is not thereby reſtrained, but his Power remains Full and Perfect as before, and he may ſtill grant them as King; for all Acts of Juſtice and Grace flow from him, as 4 Eliz. Dyer 211. The Commiſſion of Trial of Piracy upon the Statute of 28 H. 8. cap. 15. is good, though the Chancellor do not nominate the Commiſſioners as that Statute appoints, and yet it is a new Law, and Mich. 5 and 6 Eliz. Dyer 225. The Queen made Sheriffs without the Judges, notwithſtanding the Statute of 9 E 2. And Mich. 13 and 14 Eliz. Dyer 303. The Office of Alnage granted by the Queen, without the Bill of the Treaſurer, it is good with a Non obſtante againſt the Stat. of 31 H 6. cap. 5. for theſe Statutes, and the like, were made to put Things in ordinary Form; and to eaſe the Soveraign of Labour, but not to deprive him of Power.

This no judge had touched before. 3 Cro. 542, 571, 703. Co. 11. 59. t. Mo. 542. Jenk. Cent. 225. Poſt. 147, 214.

The Pope.

Next, it is certain and clear, that whatſoever the Pope did in this Kingdom, even then when he was in the greateſt Height and Strength, and when indeed he was Dæmon meridianus, was of no better Force in Right and Juſtice, than at the firſt when he was but ſimple Biſhop of Rome; ſo whatſoever he did, was coram non judice, and ſo jus non habenti tuto non paretur. And this is clearly declared by the Statute of 28 H. 8. cap. 16. ſect. prima & ſecunda.

But where it hath been thereupon inferred, that whatſoever the Pope did de facto, or uſed to do, the ſame ſhould be by this Act of 25 H 8. allowed to the Archbiſhop, and no Reſtraint to be underſtood upon the Statute, to ſuch Acts as the Pope did Lawfully; for that, they ſay, were to fruſtrate the whole Act, becauſe he did nothing Lawfully. This muſt receive a more perfect Examination, for we muſt not leave it upon ſo Wild and Lawleſs a Power, and ſo vaſt a Conſtruction. Quo Jure; quave injuria? Neither were the Pope's Acts of all Sorts equally allowed, or diſallowed, as appears clearly by this Act it ſelf, Sect. 1. which contains both his Claim, and Uſe it ſelf under theſe Words: That he claimed full Power to diſpence with all Human Laws of all Realms, in all Cauſes which he called Spiritual. And the ſame Statute ſays there, Sect. 1. and 2. that it had been ſo uſed and practiſed by many Years, by the Sufferance of the King and his Progenitors. The Truth whereof appears by the Statutes of 25 E. 3. and 30 E. 1. recited in it. And this Statute 25 H. 8. Sect. 5. where it gives Strength to the Act of the Archbiſhop, binds upon this: That they ſhall be of the ſame Force that they ſhould have been, if they had been obtained with all Things requiſite of the See of Rome. And Sect. 20. ſaving the Pope's Diſpenſations then in Force, gives them no other Force than they had before this Act; which ſhould make the whole Law eluſory, if nothing were Lawful according to the Suppoſition and Intention of that Law.

So this Antinomie is to be reconciled fœdere diſtinctionis thus: There is veritas vera, pura & realis, which is the Primitive and very Truth which anſwers the meer Right: And there is veritas veriſimilis, putativa, practica, ſuppoſitia and ex conceſſis: As for example, If a ſuppoſititious Child be once acknowledged for the true Child by him whom it Concerns, the Conſequences which follow of it are as certain ex hypotheſi, ex conceſſis, as if he were the true Child indeed. And therefore petitio principii (if it be gotten) is Elenchorum fortiſſimus. So was it in this Caſe when, by the Sufferance and Ignorance of Times, the Pope had gained the Opinion and Reputation of Supream Head of the Church. And as Hanke 11 H. 4. 37. ſays Papa omnia poteſt, and Hill. there 77 acknowledgeth him Haut & grand Soveraign from whom

Tully ſo doth diſtinguiſh of Juſtice.

Bract. Lib. 5. cap. 15. f. 412.

whom all Eccleſiaſtical Perſons have their Power, and Thirming there calls him Apoſtle. It follows by Conſequence upon a falſe ground, that his Eccleſiaſtical Acts muſt be allowed Lawful. As upon the clearing of the King's Supremacy, when the Clouds of Ignorance were diſperſed, the Conſequence of his Authority was as clearly declared, 25 H. 8. cap. 21. ſect. 2. And yet always the Crown kept a Poſſeſſion of his natural Power of Diſpenſations in ſpiritualibus 11 H. 4. 60. to retain Benefice with Biſhoprick, and 11 H. 7. 12. double Benefices; and ſo it came to this, that Communis Error facit quaſi Jus; ſcilicet when it aroſe from the Error and Sufferance of State, and of Courts of Juſtice both, for res judicata pro veritate habetur, though it be not ſo indeed. And therefore but in one Caſe let me ſhew you the Act of the King and of the Court of Juſtice, concurring to allow an Act concerning the Spirituality done by the Pope, which is the 41 E. 3. 5. where the King brought a Quare Impedit againſt the Biſhop of Sarum for a Prebend in the Church of Sarum, and laid for his Title, that the ſaid Biſhop being Prebendary thereof before he was Biſhop, the Biſhoprick avoided, and ſo the Temporalities being in the King's Hands, the Defendant being Prebendary was made Biſhop, and ſo the Prebend avoided, and belonged to the King to preſent. The Defendant pleaded in Bar, that the Pope having reſerved this Biſhoprick to his Collation gave it to the Defendant; whereupon the King reciting the Pope's Gift delivered him his Temporalities, after which he was conſecrated, which Conſecration made the Avoidance of his Prebend; at which Time the Temporalities were out of the King's Hand, and in his Hands; whereupon it was adjudged, that the Gift of this Prebend did belong to the Biſhop, and not to the King.

25 H. 8. cap. 21.

The King

Dav. 79. b.

Whereof note, that though the King might have given this Biſhoprick by Force of the Stat. 25 E. 3. by reaſon of the Pope's ſaid Uſurpation upon the Dean and Chapter's Election, and alſo in Default of the Election, as by Condition broken, whereupon they held the Right of Election by the Gift of the Crown, as the ſame Stat. 25 E. 3. alſo ſays, yet that being not done, which was the temporal Part; you ſee that he was both by the Allowance of the King, and Judgment of the Court, holden a Biſhop Elect, de facto, by the Pope's Authority only, or elſe the Livery of the Temporalities to him had been utterly void.

Yet even in thoſe Times the King was not excluded, but ſtill was acknowledged to have Power of Diſpenſation and other Eccleſiaſtical Acts: And therefore at the firſt did give Biſhopricks and Abbeys, and after granted the Election to the Deans and Chapters and Convents, 6 E. 3. 11. and 11 H. 4. 68. and might grant Diſpenſation to a Biſhop Elect, to retain a Benefice, 11 H. 4. 60. and to take two Benefices, and to a Baſtard to be a Prieſt, 11 H. 7. 12. So now we muſt agree, that the Archbiſhop cannot do all Things that the Pope did de facto, for he made a Proviſion upon all Churchmens Benefices de facto, without their Conſent, as appears by the Statute of 25 E. 3. but thoſe the Laws and Courts did ſtill pronounce to be Unjuſt and Injurious. But the Statute is to be underſtood of thoſe Things that the Pope was by the Erroneous Opinion of that Time ſuppoſed to do Lawfully, ſcil. in meer Spirituals. And indeed a Man may well ſay Non conceſſit of that which a Man hath no Power to grant, as well as if he made no Grant. Now then the Archbiſhop is reſtrained to thoſe Acts only that the Pope did quaſi de Jure, that is in ſpiritualibus only.

The King. Ant. 146. Dav. 72.

Bract. 412.

But now I proceed and affirm, that the Archbiſhop is reſtrained by the Statute it ſelf in four main Heads and Caſes, which were accounted Spiritual, and put in Diſpenſation every Day by the Pope.

Four Caſes wherein the Archbiſhop is reſtrained from Diſpenſation. Poſt. 149.

And the firſt is in Sect. 3. and 12. that nothing be repugnant to the Law of Almighty God, neither for King nor Subject. So no Advantage for prohibited Marriages, as Tanfield Lord Chief Baron thought.

1. Ridley's View. 103.

Secondly, that nothing be againſt the Stat. of 21 H. 8. againſt Pluralities of Benefices.

2.

3. That nothing be done againſt the King's Prerogative or Laws and Statutes of the Realm in general, which is not in the Statute totidem verbis, as the two other Caſes here, but is inferred plainly upon the Diſpoſition of thoſe Times, and upon this Law it ſelf. For this Stat. Sect. 21. baniſheth all Licenſes, &c. made [illegible]ne contrary to the Proviſions of the Laws and Statutes of the Realm, having in the Sect. 20. next before eſtabliſhed Licenſes and Diſpenſations from Rome then in being generally; which ſhews and makes the plain Diſtinction: That the King never before, nor ever after this Statute, meant to allow Diſpenſations againſt the Common Laws, howſoever the Pope hath practiſed ſuch ſometimes. For the Diſpoſitions of thoſe Times, I obſerve the Stat. 25 H. 8. Cap. 14. Sect. 1. which inveighs againſt the Proceedings in the Caſe of Hereſie, by the Pope's Canons which are repugnant and contrary to the Prerogative Royal, and Laws and Statutes of this Realm. And the Statute 25 H. 8. Cap. 19. Sect. 3. which baniſheth all Canons Provincial in that kind.

Fourthly, he is reſtrained Sect. 3. in three Places to Caſes, and Matters, that ſhall be convenient and neceſſary upon Examination of the Cauſes and Qualities of the Perſons; and Sect. 12. ſpeaking of a Remedy, where the Archbiſhop ſhall refuſe to grant Diſpenſations. By the Authority of that Act, it is limited to ſuch perſons as ought of a good, juſt and reaſonable Cauſe to have the ſame; wherein you ſhall ſee that I mean not any Thing ſhall be re-examined that is committed to their Examinations by this Law; as I ſhall hereafter ſhew, when I ſhall have Occaſion to ſpeak of
2 Inſt. 684. that Purpoſe. So I hold, that an Archbiſhop cannot license a Marriage within the Degrees prohibited, as being againſt the Law of God. And yet the Pope did it, and doth it at this Day elſewhere. I hold likewiſe, that he cannot diſpence in ſome Caſes mixt againſt the Law of God, and the Laws of the Realm alſo; as to diſpence with an Alien, that neither ſpeaks
Denizen, Br. 15. nor underſtands Engliſh, to have a Benefice here, which yet was practiſed by the Pope, as appears by the Statute of Carliſe, 30 E. 1. recited in the Statute of Proviſors, 25 E. 3. which declaims againſt the Pope for giving ſpiritual Promotions to his Cardinals, Italians, or the like, which never did dwell, nor might dwell here: Whereas it is of the Eſſence of a Paſtor to be didacticus, to teach the People in their own Language, 1 Tim. 3. 2 Cor. 1. 14. and ought alſo to be Hoſpitals, and ſo the ſaid Statute of Carliſe ſaith.
Plo. 497. a. That the Prelacy and Churchmen of England were founded, to inform the People in the Law of God, and to keep Hoſpitality, and do Alms and other works of Charity in the Places where the Churches were founded.

I hold likewiſe, that the Archbiſhop could not by the Meaning of this Law appropriate a Benefice with Cure to a Nunnery, between 25 H. 8. and the Diſſolution of Monaſteries, though the Pope made many de facto, for a Woman cannot be a Paſtor by the Law of God, 1 Cor. 14. 34. 1 Tim. 2. 11, 12. And Dyer in Grimdon's Caſe ſays well, that it was a Thing Abo-
Br. Officer, 48. minable. I ſay more, that it was againſt the Law of the Realm; for Beneficium non datur niſi propter officium, and it is no Reply that the Cure may
Co. L. 3. b. 11 Co. 87. a. Mo. 43. Poſt. 150. be ſerved by a Curate for them; for the Queſtion is not, how they can make a Curate, but how themſelves are capable: And therefore in 5 E. 3. 4. Brook Patents 108. 9 E. 4. 6. and 4 and 5 Ph. and Mar. Dyer 150. If an Office of Learning be given to a Man utterly Inſufficient, it is utterly Void; and though it be to him and his Aſſigns, or to be exerciſed by his ſufficient Deputy it mends not the Caſe; but it muſt radically veſt in the firſt Grantee,
Plo. 496. b. before it can go in Title of Procuration, or Deputation to any other.

Now it is well ſaid in Grimdon's Caſe, that proper and operative Word, that doth appropriate, is to make the Patron and his Succeſſors perpetual Perſons, which ſhould here be the Prioreſs, and her Succeſſors, which falls as I have ſaid; for jura naturæ ſunt immutabilia. But ſuch, and all other
Mo. 606, 836. 5 Co. 102. a. Appropriations, howſoever defective, were given to the King by the true Meaning of the Laws of Monaſteries, which meant to give all, as well, in Reputation, as in Truth: yet I agree with the Book 12 and 13 Eliz. Dyer 292. B. That if a meer Layman, yea, or a Man utterly Illiterate be preſented,

pꝛeſented, inſtituted and inducted, that this is not a meer Nullity; but he is a Parſon de facto, foꝛ he hath all the Ceremonies to make him a Parſon, and his Inſufficiency muſt receive Examination; but the Incapacity of a Woman appears in it ſelf, And though the Lazy and illiterate Man be a Parſon de facto, yet no Diſpenſation can make him a Lawful Parſon not ſubject to Depꝛivation, becauſe it is malum in ſe, even as a Man may get Land by diſſeiſin de facto, but no Licenſe can make it Lawful. 5 Co. 102.

But all theſe Enoꝛmities in the Time of the Pope's tranſcendent and unqueſtioned Power ſtood firm: Foꝛ what Oꝛdinary oꝛ Eccleſiaſtical Judge durſt Queſtion his Act who could not Err? And if any durſt, the Pope had Power to diſauthoꝛize his Pꝛoceedings thꝛee Ways, that is indeed by all; Anticipando, by taking the Cauſe to his own Cogniſance by Pꝛevention. Concurrendo, by joining ſome other with him that might Oveꝛ-rule him. And Avocando, by taking the Cauſe out of his Hands, and ſo to make himſelf both Paꝛty and Judge.

Having thus cleaꝛed my Way, and made ſome general Obſeꝛvations upon the Statute, and alſo diſtinguiſhed the Kinds of Commenda, I will now examine this Commendam we have now in Hand, not by the Laws of Italy oꝛ France, but by the Laws of England, whether Common, oꝛ Cannon Law, by which it muſt be judged.

And firſt, becauſe the Laws of the Realm do admit nothing againſt the Law of God, I quit this Commenda, that I do not condemn it foꝛ any Contrariety to the Law of God; foꝛ though it be de Jure Divino, that Chꝛiſtian People be pꝛovided of Chꝛiſtian Offices and Duties, as of Teaching, Adminiſtration of the Sacraments, and the like, and of Paſtoꝛs foꝛ that Purpoſe; and theꝛefoꝛe to debar them wholly of it, were expꝛeſly againſt the Law of God; yet the Diſtinction of Pariſhes, and the Foꝛm of furniſhing of every Pariſh Church with his pꝛoper Curate, Rectoꝛ oꝛ Paſtoꝛ, by the way of Pꝛeſentation, Inſtitution, &c. as is uſed diveꝛſly in diveꝛs Churches, and the State oꝛ Title which he hath, oꝛ is to have in his Church and Benefice, is not a Poſitive Law of God in Point of Circumſtance; and we know well, that the Pꝛimitive Church in her greateſt Purity, were but Voluntary Congregations of Believers, ſubmitting themſelves to the Apoſtles, and after to other Paſtoꝛs, to whom they did miniſter of their Tempoꝛals, as God did move them. So as Eccleſiaſticus cap. 17. 17. ſays, God appointed a Ruler oveꝛ every People, when he divided Nations of the whole Earth. And theꝛefoꝛe if a People will refuſe all Government, if it were againſt the Law of God; And yet if a Popular State will receive a Monaꝛchy, it ſtands well with the Law of God. This *Commendam* not againſt the Law of God. Kel. 191. A Perſon, or a People Heretical may by juſt Authority be excommunicated or indicted. Plo. 304. Ant. 141, 147. Seld. Hiſt. Tithes, 56. Mo. 436.

But now to come to the Main; I hold this Commendam to be void in Law, becauſe it is Contraꝛy, oꝛ ratheꝛ Contꝛaꝛiant, Repugnant, Diſſonant and Deꝛogatoꝛy to the Laws of the Realm, and the Analogy of them, foꝛ ſeven Faults, oꝛ Reaſons. This *Commendam* void, for ſeven Faults.

The firſt is this, that Power is given by this Commenda to the Biſhop Defendant, propria Authoritate, to take Benefices with Cure oꝛ without, and to enter and take Poſſeſſion of them, and to conveꝛt the Pꝛofits of them to his own Uſe without Inſtitution, Collation, Induction, oꝛ other Solemnity of Law whatſoeveꝛ; no Reſtraint oꝛ Pꝛoviſion being made, that the Benefices, that he ſhall ſo take, ſhall be void, when he ſhall take, enter and poſſeſs them, as it ought to be. 1 Fault. Dav. 74. a. Accord.

Secondly, it is not pꝛovided in the Commendam, that the Allowance and Conſent of the Patron be had and gotten, befoꝛe he Execute the Commendam, as it ought to be. 2 Fault. Dav. 74. a. b.

Thiꝛdly, the Commenda Tempoꝛary, moꝛe than foꝛ ſix Months, and leſs than foꝛ Life, cannot ſtand with the Rules of the Common Law of the Realm. 3 Fault.

Fouꝛthly, he that hath a Benefice in his Gift, by Lapſe, is leſs able to make ſuch a Commendam of it, than he that hath the Advowſon in his pꝛoper Intereſt. 4 Fault.

Fifthly, I add a Coꝛollary oꝛ Appendix, riſing out of all theſe Exceptions, which I may call Argumentum ab Authoritate negativa; that there was never 5 Fault.

never Commendam of this Form or Nature, heard of in any Book of Law, or Record, before the Statute of 25 H. 8. or ever any ſuch hath received any Allowance by any Judgment, or judicial Opinion; but hath rather, when they have come in Queſtion, been diſallowed and condemned.

6 Fault. Sixthly, this Commendam is void by the Statute of 21 H. 8. Pluralities, becauſe it contains not it ſelf within the Number of Benefices allowed by that Law.

7 Fault. If there were no Statute nor Law at all againſt Pluralities, yet this Commendam giving Power to take Benefices of any Sort or Number, ſo the Value exceed not 200 Marks, is not warranted by the Statute of 25 H. 8. as being neither neceſſary nor convenient, but clean contrary; and yet I will leave them the Latitude of their Diſcretion allowed them by the Statute.

The firſt Reaſon of the firſt great Point. To the firſt, a Patron cannot preſent to a Church full, neither can a Commendam be made to a Church certain, that is then full; for there is no Difference betwixt a Commendam and a Preſentment, but that the one Preſents the Parſon to the Church, the other commits the Church to the Parſon, both being incompatible when the Church hath his proper Rector, or Husband already; and therefore cannot be married, or beſpoken to another. And the Canons, when they ſpeak of Commendams, rely upon Eccleſias vacantes, and neceſſitas & utilitas Eccleſiæ vacantis, as before.

Suppoſe the Commendam had ſaid, that he might take and enter Eccleſias vacantes, vel non vacantes: This is in Effect the ſame. For it is generally, Beneficia cujuſcunque nominis, qualitatis, &c. So that if he enter a full Church, one cannot ſay he hath exceeded his Licenſe, but the Licenſe it ſelf hath exceeded.

And note alſo, that the Commendams were not in ancient Times made in Terms general, as this is, to any Churches uncertain, but to ſome certain Church then void; as appears both by the Texts of the Canons, and the Practice of the two famous Precedents before remembred, Fundenſis, and Luſitania.

This Abſurdity can receive but two Anſwers.

First, that the Commendam is to receive civilem intellectum, of Churches void only, though it be general.

The other, that this Church of Clifton was void when it was taken; and ſo no Intruſion.

To the firſt I reply, that the Papacy was a meer and plenary Tyranny, eſpecially towards Churchmen, and in Church Cauſes. Now a full Tyranny hath two Parts, the one ſine jure uſurpare; the other, inordinate imperare.

2 Inſt. 48. And ſo the Statute of 28 H. 8. cap. 10. proves; for the Statute calls it an uſurped Tiranny, and the Exerciſe of it a Robbery, and ſpoyling of the King, and his People. And this Statute of 25 H. 8. Sect. 14. calls it Ruin and Spoyl of the Realm; ſo you ſee both Parts have Tiranny in it.

Now it is Plain, that he had no more Right upon the Advowſons of Churchmen, than of Lay-men; and therefore they had the ſame Remedy againſt his Proviſions by Quare Impedit in the King's Court that Laymen had, if they durſt have uſed it; as appears by the 11 H. 4. 76. and the Statute of 25 E. 3. of Proviſors; but becauſe they were in his Danger in meer Spirituals, ſubject to Deprivation, Depoſition, and the like; and to receive Promotions by him, he wrought his Will upon them, oblique in temporalibus, which was the Cauſe that the ſaid Statute 25 E. 3. gave their Preſentations to the King, when the Pope uſurped upon them, as to a Fortification againſt Invaſion.

Plo. 493, 500. a. And that the Pope did uſe to provide two Benefices full; ſee two expreſs Statutes 7 H. 4. cap. 8. and 3 H. 5. cap. 4. Raſtal, Proviſions 20 and 22. And that a civil Underſtanding will not help; ſee Grimdon's Caſe judged in the Point; that if an Appropriation be made of a Church then full, it is utterly void; except it be made by expreſs Words, de futuro quando vacaverit, which is the Clauſe wanting here.

So

So Paſchæ, 9 Eliz. Dyer 259. 9 Edw. 4. 6. 3 H. 7. 16. the Office of Steward of Courts being full, cannot be granted to any other, but by the King. And that not by preſent Words, but by Words de futuro quando vacaverit.

Now to the ſecond anſwer, that this Church of Clifton was void, both when the Commendam was granted and executed, I reply, that this anſwer had been good if the Commendam had been of that Church certain, as the King's Preſentation is in the Caſe. But the Commendam is of any Churches generally, ſo it gives Power to execute upon any void, or not void, which is againſt the Nature of a Commendam; ſo the Fault I find, is not in the Execution of the Commendam, but the Conſtitution of it; which being not warranted by the Laws of a Commendam, makes it no Commendam at all, and then it can bear no Execution at all, for Jura naturæ ſunt immutabilia, which extends to particular Natures and Forms of every Thing, quæ dant eſſe; for if you change the eſſential Form, it may be ſome other Thing, but it is not now the ſame that it was. Omnis forma, per quam quæque res in propria ſpecie conſtituitur, perfectio quædam eſt: Perfectum eſt cui nihil deeſt ſecundum ſuæ perfectionis vel naturæ modum. 11 H. 7. 9.

Now to ſhew that a good Execution will not Profit where the Conſtitution is Defective: See Mildmayes Caſe 24 Eliz. in Coke Lib. 1. 175. Sharrington reſerved a Power to himſelf to limit Uſes to any Body; this Limitation in general being utterly void, he could not limit any Uſe to his Daughter. So 33 Eliz. Coke Lib 1. 154. the Lord Paget, in Conſideration of Payment of Debts, covenanted to ſtand ſeized to the Uſe of Charles Paget for Years, though he made him Executor after; yet the Limitation is void.

Vernon's Caſe, Coke lib. 4. 2. If A. make a Feoffment to the Uſe of a Stranger for Life, the Remainder to his Wife for her Jointure; though the Stranger die before the Husband, yet this will not be made a Jointure. Winch. 33. Hutt. 51. Co. L. 36. t. 1 Co. 176. a.

So Trin. 12 Jac. Rot. 3264. in the Common Pleas, Oate's and Frith's Caſe. A Man ſeized of Land in Fee; he and his Son and Heir joined in a Leaſe to begin after his Death, yielding a Rent to his ſaid Son: He died, his Son proved his Heir, and yet the Reſervation was adjudged Void. Ant. 130. 2 Ro. 70.

Now to the ſecond Part of the Commendam. That there is no Proviſion that the Patron's Conſent be had; which is ſo Neceſſary as that the Gloſs upon the Council of Lyons, and upon Othobons Provincial is ſecundum omnes Patroni conſenſus, & omnium qui lædi poſſunt requiritur. As if the Patronage be divided, as A. to name to B. and B. to preſent over as the Books are 1 H. 5. 1. 14 H. 4. 11. and other Common Books. And again, Quod ſatis obſervant Prælati, qui niſi præſentati per patronos, non faciunt Commendas. And 11 H. 4. 76. Hanke, and Hor. The Pope may Grant that a Man may have divers Biſhopricks with Conſent of the Patron. So it ſeems that in Caſe of Commendam, the Parſon was firſt preſented by the Patron to the Biſhop, which was indeed the natural Courſe, the Patron being the firſt Actor, and the Commendam working but the Effect of an Admiſſion, Inſtitution, and Induction. Now this Inſtrument of Commendam doth expreſly exclude the Patron in theſe Words, Authoritate ſua propria capere, & apprehendere abſque inſtitutione, collatione, Inductione, vel alia quacunque juris ſolennitate, &c. which (alia) muſt refer to the Preſentation to exclude that, becauſe the ſpiritual Solemnities were named, and excluded before Specially: Solenne eſt quod ſolet fieri, Aug. The ſecond Reaſon upon the firſt great Point. Dav. 74. b. 75. a. 81. a. *Quare Impedit*, Br. 51.

Now if the Commenda had been, that he might take the Benefices without the Patron's Conſent, it had been Void; this is the ſame in Effect in cloſer Words.

Yet know the Degrees of the Pope's Practice in Commendams by Rebuffus de praxi, &c.

The Pope provided upon the Churches of the Clergy abſolutely; upon the Churches of the Lay-patrons his Proviſion was not good, but either with an expreſs Clauſe, Dummodo conceſſus Patronorum Laicorum adhibeatur; or with an Expreſs, Non obſtante, the Patrons Conſent were not had. Dav. 74. a. b.

So by their own Rules, the Inſtrument of Commendam it ſelf muſt provide for the Conſent, or the Diſcharge of it, for the Pope ſaw that the Patron was to be one. So this Form is worſe than his.

But

But if a Commendam were made to the Patron himſelf, it were good in this form, as an Appropriation, which is always to the Patron.

Now that the Patrons Right was never ſubject to the Church-men or Officers Eccleſiaſtical; and that it was the more Worthy and firſt Act and Part of the Promotion to the Benefice, is apparent in all Diſpoſitions and Tranſpoſitions of Benefices, as in the ordinary Preſentation of the Appropriation, in the Union of Churches, 50 Edw. 3. 27. 14 Hen. 6. 15. In deriving of a Vicarage, 17 Edw. 3. 51. 15 Edw. 2. Fitz. Quare Impedit, 165. In tranſlating of a Parochial Church to a Collegiate, 50 Edw. 3. 26. in Permutation, and Change of Benefices, 45 Edw. 3. F. Exchange 10. For the Patrons muſt preſent croſs de novo, and did ſo there. But it is true, that it ſhall depend upon the Execution and Enjoying of the Exchange, as that Caſe is in both Points, and the Reſignation and Proteſtation of both the Incumbents, Regiſter 306. B. is. In which Caſe, if the Reaſon of his Change fail; either Incumbent ſhall return to his old Benefice, in priſtino ſtatu, upon his former Preſentation.

Plo. 499. b. Dav. 74. b

The Patronage is both granted and pleaded by the Name of libera diſpoſitio Eccleſiæ; 14 Edw. 4. 2. and 7 Edw. 3. 4. by the Name of the Church it ſelf. And the Quare Impedit is, quod permittat præſentare ad Eccleſiam, &c. quæ vacat & ad ſuam ſpectat donationem. And truly the Acts of the Ordinary are in Execution of it; as the Admittance of a Copy-holder upon Surrender.

Syd. 389. *Quare Impedit*, 53. Hut. 24. 7 Co. 28. a. Cr. El. 119. Cr. Jac. 216. 2 Ro. 368. Dy. 277. p. 55. Preſentation & B. 51, 58. Degg. 11. Poſt. 166. Mo. 900. 1 And. 142.

The Patron's Preſentment takes Place againſt the Ordinary, after Lapſe incurred, 13 Ed. 3. 4. 34 Ed. 3. 11. 11 Hen. 4. 80. and againſt the King's Lapſe likewiſe. Kelw. 50. B. Mo. 900. F. N. Br. 38. ff.

Trin. 7 Eliz. Dyer 241. Caſe Watſon, Quare Impedit, againſt the Archbiſhop and his Incumbent upon Default; the Plaintiff made Title, and had a Writ to the Sheriff, where it was found, that the Church remained void two Years, ſo the Lapſe devolved to the Crown, and now is full of the Collation of the Archbiſhop, and the Plaintiff had Judgment of Damages but for half a Year, becauſe he ſhould remove the Clerk, and a Writ to the Biſhop: Note, for it is not fully within the Rule, nullum tempus occurrit Regi; for the Patron's Title continues 'till the Lapſe executed: So the King's Time is not veſted in him Peremptory, as in other Titles.

Plo. 493, 501. a.

No Act of the Ordinary can diſappropriate the Church; but if the Parſon appropriate (which is Patron) preſent, it did diſappropriate, 38 H. 6. 20. 11 H. 6 18. Fitz. N. Br. 35. And I am of Opinion, that if he preſent, and his Clerk be refuſed for juſt Cauſe and Notice given, that Lapſe ſhall incur; for the Appropriation gives him a Charge to hold, or not. As appears by the Form of an Appropriation in Grimdon's Caſe, which by his Preſentment he hath renounced. Now ſince the Patron's Right and Part to the filling of the Church, and making an Incumbent, is prior tempore, & potior jure, ſince both in Time and Dignity it is firſt, ſhall the Ordinaries Act be good to perfect and finiſh the Act, which the Patron ought to begin to him; to give the Incumbent Leave to leave the Door, and come in by the Window?

Now what Anſwer hath been made to this? None, but that the King, who proved Patron, did conſent before the Commendatory entred, which is not ad idem (as we have ſaid before) when we ſpake of the Conſtitution, to anſwer me with the Execution. And the Pope's Practice was in this exact, as you ſee in Rebuffus before, though he took upon him more in the Patronage, than belonged to him.

Ant. 151.

Suppoſe that the Archbiſhop ſhould commend to a certain Church Void, licet Patronus non conſenſerit, and ſo in the general this is, the Inſtrument of Commendam were Void, though the Patron would after Conſent.

The third Part of the Commendam is, that it is Temporary, which brings with it ſo many Incongruities, Inconveniencies and Abſurdities in Law, as cannot be born; for the Church is neither altogether Void, as it remains in the Caſe of a Commendam Semeſtris, which is but a Sequeſtration of

The third Reaſon upon the firſt great Point. 2 Cr. 690. Ant. 90.

of Fruits and Cures 'till the Patron Preſent; neither is the Church abſolutely full; for then it ſhould be, as it appears by the Pleading, plena & conſulta, that is, plena de poſſeſſore, & conſulta de Rectore: Now plenum eſt, cui nihil addi poteſt ſecundum modum ſuæ capacitatis: Now that clearly is not ſo in this Caſe, for he hath not the Benefice entirely, neither in Paſtoral Cure; for there is no more but a Proviſion put upon him (not to ſerve the Cure himſelf, as the Law ſpeaks to the true Parſon, Accipe curam tuam, but) that the Church be not defrauded. Neither hath he the Benefice wholly in him, as a Rector, ſo as he may be ſaid to be ſeiſed in Fee, or be ſaid a Succeſſor or Predeceſſor to the Parſons that were before, or that ſhall follow. And a Benefice is ſo entire and indiviſible, that it cannot be preſented or commended by Parts as the Cure, without the Fruits, nor the Fruits without the Cure, nor the Glebe to one, and the Tithes to another, or the like: And by the ſame Reaſon the State and Perpetuity of the Incumbent cannot be divided or diminiſhed, as that he may take and hold it for three or four Years, or as this is, ſo long as he ſhall remain Biſhop. Again, this were to keep a Freehold in a perpetual Abeyance, which the Law doth permit out of Neceſſity, as upon Death of Biſhop or Parſon, or the like, but never allows it to the Act of the Party; and therefore if a Man make a Leaſe for Years, the Remainder to the right Heirs of I. S. I. S. being alive, the Remainder is utterly Void. This Commendatory cannot have a Juris utrum, which is, utrum ſit libera Eleemoſyna pertinens Eccleſiæ ſuæ; for the Church is not his, he cannot take to him and his Succeſſors; he cannot ſue, or be ſued in a Writ of Annuity, or the like. It ought to be vinculum conjugale, between the Rector and the Rectory. Now this is, as if a Man ſhould take a Wife with Proviſion to keep her 'till he can get a Richer: See the Gloſs upon the Precedent before cited, of Eccleſia Sillatina, which holds, that the Pope may make an Inſtitution to a Benefice for a Time only. Out of which obſerve the Fallibility of foreign Authors, and foreign Practice; for by the Laws of England, the Acts of Preſentation, Inſtitution, and Induction, are all Authorities given by Law, and muſt be executed according to the Form preſcribed by Law, and cannot be modified; for Actus legitimi non recipiunt modum; for the Law gives the Church, not the Patron and Ordinary, who are but ceremonious Miniſters, and are appointed their Manner and Form, which they may neither exceed nor abridge. So a Man may aſſign Rent for Dower, out of the Land Dowable, without Deed: But it muſt be for no leſs Eſtate but for Life, 7 H. 6. 34. 33 H. 6. 2. yet there is Intereſt and Authority joined. Nay, a Jointure, which is but an Imitation of Dower, or a Baſtard Dower, cannot be made for the Life of another, Coke lib. 4. 3. Moile 39 H. 6. 40. holds a Protection to be void, if it be for leſs than a whole Year, M. 6. E. 6. Dyer 76. in caſe of Quarentine the Wife muſt not depart from the Houſe upon her Husband's Death, and return when ſhe will for the reſt of her Days. If the King grant the Office of Cuſtos Rotulorum, or Chief Juſtice to two, it is void, 18 E. 4. 7. I cannot Grant the Offices of my Gift as Chief Juſtice, for leſs Time than for Life; if the King grant the Cuſtody of the Land of a Lunatick, abſque compoto, it is void, 28 H. 8. Dyer 26.

Dav. 74. a.

Poſt. 338. Accord. 3 Co. 20. a.

Vaug. 27.

Co. L. 34. t. Dow. Br. 97.

But a Commenda perpetua may be admitted; for it amounts to a Collation or Proviſion, and hath full Words that he may take and receive a Benefice, void, of the Gift or Preſentation of the Patron, and enter into it without Inſtitution, &c. and take the Profits as Rector in Commendam for Term of his Life.

Now it is true, that it is in a ſort Repugnant that a Man ſhould have a Perpetuity irrecoverable in a Thing that he takes only to keep; for ſo was the Original of a Commendam. But here where the Words are ample, to make a full Incumbent, the Word Commendam ſhuffled in may be counted void, as in Grindon's Caſe it is reſolved; the perfecteſt Word to make an Appropriation is to make him Parſon; ſo yet a Periphraſis equipolent, like unto this, will ſerve.

Jones, 159.

Now what hath been the main anſwer unto this; that the Nature of a Commendam is to be Determinable, and not Perpetual.

To which I make a double reply.

First, that the Commenda may be perpetua, and that is the beſt and perfecteſt Kind, as appears before by Canons and Doctors. But ſuppoſe that were ſo, I ſay, the Pope's Chair is no Court of Parliament to make Laws for Inheritances or Free-holds in England; neither is it in any Man's Power to create new Natures in Law, according to new Inventions, except they may ſtand with Jus Commune, which is natura univerſa. To this Purpoſe. Therefore in the like Caſe, in matter of Manners, Tully gives good Advice, Contra naturam univerſam nihil contendamus, ea tamen conſervata propriam ſequamur: Was it not ſo in our Caſe of Perpetuities? Every Man made new Laws for his proper Patrimony, and they ſtood long in vulgar Opinion, not without the Aſſiſtance of learned Men: But now explosa eſt ſententia, being contrary to the Laws; for politiæ legibus, non leges politiis adaptandæ.

4 Fault. 1 Le. 234, 235. 1 And. 149. Dy. 277. p. 55.

The fourth Fault of this Commendam is, that it is grounded upon a Lapſe, (wherein is to be conſidered the Nature of a Lapſe) which is not an Intereſt naturally, as is the Patronage, but a meer truſt in Law.

7 Co. 28. a. Ant. 152. 2 Cro. 216. utra.

If the ſixth Month be incurred, yet the Patron's Clerk ſhall be received, if he be preſented before the Church be filled by the Lapſe, 13 E. 4. 3 Brook Plenarty, 15. 43 E. 3. 11. 11 H. 4. 80. Obſerve 7 Eliz. Dyer 241. for it ſeems by that Caſe, that the Patron ſhould Preſent againſt the King's Lapſe, for he hath Damage but for half a Year.

Nullum tempus, &c. binds not, becauſe the King is in his actual Preſentment againſt the Patron. Mo. 900. 2 Ro. 368. 3 Cr. 119. 1 Inſt. 90. a.

A Lapſe cannot be granted over as a Grant of the next Lapſe of ſuch a Church, neither before it fall nor after. If the Lapſe incur, and then the Ordinary die, the King ſhall Preſent, and not the Executors of the Ordinary: For it is rather an Adminiſtration than an Intereſt, Fitz. Nat. br. 34. G. 25 E. 3. 24 Dyer 87. is doubtful, whether to the King, or to the Metropolitan. And I hold it clear, that if the Patron preſent, and his Clerk be inſtituted, and remain without Induction eighteen Months, the King ſhall not Preſent upon him by Lapſe, as he may do upon a direct Patronage accruing to him by Guard of Temporalities, or of his Tenant's Heirs after Inſtitution before Induction, Fitz. N. B. 34. 36 K. for the King cannot have a Lapſe, but where the Ordinary might have had it before. Meſme l' ley d' Metropolitan. 6 Co. 52. a.

Noy. 69.

Co. L. 344. b. 2 Cro. 93. 1 Inſt. 345. a.

Plo. 498. b. 322. a. 1 Cr. 356.

But a Lapſe (as I have ſaid) is an Act and Office of Truſt repoſed by Law in the Ordinary, Metropolitan, and laſtly in the King (who is certum & ſtabilimentum juſticiæ) the End of which Truſt is to provide the Church of a Rector, in Default of a Patron; and yet as for him, and to his behoof. And therefore as he cannot transfer his Truſt to another, ſo cannot he divert the Thing wherewith he is truſted to any other Purpoſe: And therefore, though the King or Biſhop may ſuffer the Church to ſtand void (which yet is culpa) yet they cannot bind themſelves, that they will not fill the Church; for that were injuria & malum in ſe, and therefore ſhall be judged in Law, in Deceit of the King, for eadem mens præſumitur Regis, quæ eſt Juris, & quæ eſſe debet, præſertim in dubiis.

Poſt. 316. Palm. 311.

Now the Ordinary, or he that is to preſent by Lapſe, is as it were Negotiorum geſtor, or a kind of Attorney made by Law, to do that for the Patron which it is ſuppoſed he would do himſelf, if there were not ſome Left: And therefore the Collation by Lapſe is in Right of the Patron, and for his Turn, 24 E. 3. 26. And he ſhall lay it as his Poſſeſſion, for an Aſſize of darrain Preſentment; 5 H. 7. 43. E. N. B. 31. F. The like if it were by Proviſion of the Pope, 7 E. 3. Fitz. Aſſize darrain Preſentment, 3. And upon 17 Edw. 3. 60. If my Attorney to preſent two Benefices, ſhould conſent or agree to ſuch Commenda as this, it would be void, as out of his Warrant; theſe Kinds of Adminiſtrations for others are never extended beyond Ordinaries.

1 Cr. 356. 4 Le. 210.

5 Co. 76. 2 Cr. 178 Dy. 222. Mo. 52. Co. L. 268.

Bailiffs may receive Rents of old Tenants, they cannot accept new upon Change of Tenants, they cannot enter for Non Payment of Rent, much more

more in Caſe of Procurations made by Law, the Reaſon is, they are but a proviſional Miniſtery, for Caſe of Neceſſity, and certain Benefit of the Lord.

The Eſtates and Perſons of Ideots and Lunaticks are by Law intruſted to the King: If therefore, the King ſhould grant to one that intrudeth upon the Poſſeſſions of an Ideot or Lunatick, or takes their Perſons unlawfully, that he would not meddle with them, but ſuffer them to do their Pleaſure, theſe Grants were void. For theſe were Acts of Juſtice, and Offices of a King, which he cannot put off: Ceſſa Regnare, ſi non vis Judicare. And in theſe Things the King is never ſuppoſed by Law ill affected, but abuſed and deceived; for, Eadem præſumitur mens Regis, quæ eſt juris: So the 7 H. 4. 42. B. and 21 E. 3. 47. the Earl of Kent's Caſe, if the King being but Guardian grants the Land in Fee, the Grant is void. So we judged lately; if a Sheriff make an Under-Sheriff, and take Bond of him, that he ſhould not ſerve Executions without his Conſent, the Bond would be void; ſo it is reſolved C. Lib. 7. 36. that the King cannot give away a Penal Law: So here, if the King having a Lapſe ſhould grant to an Intruder that he would not preſent to the Church, yea, or perhaps, if one ſhould Uſurp upon the King's Lapſe, and the King ſhould grant to the Uſurper that he would not remove his Clerk; for this were a Breach of that Truſt which the Law repoſeth in him, as well for the Behoof of the true Patron, as for the Good of the Church; for by this Means the Patron ſhould loſe his Patronage.

Bodin de Rep. 4. cap. 6. f. 452. Raſt. Ent. 544.

1 Co. 44. a. 11 Co. 74. b.

Ant. 13.

Poſt. 183.

The fifth Exception, or rather Argument, out of all the former Exceptions, an Appendix, or Corollary after them all I draw, a praxi Beneficiorum in Anglia, as Rebuffus writes, de praxi beneficiorum in Francia. For by the Law and Practice of this Realm, we muſt judge here, not by the Practice of Foreign Nations, much leſs by the Practice of Rome, the Pope's Temporal Principality or Demeſne of the Church, which they call patria obedientia, but we may well call it patria jugo aſſueta or ſervituti ſubjugata. And beſides, we know not the Conſtitution of their Patronages and Church-livings in Foreign Kingdoms. But this I ſay, that no Man ſhall ſhew me Book of Law, Statute, Authentical Reſolution, or Judicial Opinion, nor Hiſtory, nor Chronicle, that did ever allow in this Realm a Commendam in the Capere, or Apprehendere, and to hold propria Authoritate, for a Time leſs than for Life, either from the Pope, or any other; but ſuch Opinion, as hath been, hath been againſt it, neither ſhall any Man ſhew me the Word Commenda in Book of Law or Statute of England, before 25 H. 8. only 11 H. 4. 76. Thirning and Hanckeford agree, that the Pope may grant to a Biſhop to take Benefices de Novo. And likewiſe Horton, and Hanckeford there, that one may be made Biſhop of divers Sees by the Pope, if the Patron aſſent; which I grant, underſtanding Benefices totally, with Conſent of Patron, and free from the Exceptions that I have, and ſhall take againſt it.

The fifth Reaſon upon the firſt great Point.

In the Caſe of the new Book of Entries, fol. 521. Paſ. 43 Eliz. Rot. 1028. by the Queen, againſt the Biſhop of Coventry, and Crumpton, Warburton, and Kingſmell, Judges argued openly, and at large, againſt the Commendam for the Queen; and Anderſon alſo declared his Opinion ſo. But Walmſly declared his Opinion to the Contrary, without Argument. Whereupon the Queen's Attorney entered a Nolle proſequi.

2 And. 181.

Now it is to be obſerved, that all the Inventions of the Pope concerning the Diſpoſition of Benefices, Biſhopricks, and other Church-livings in England, were ſtill to make Perfect, not mutilate Incumbents. As Appropriations, Collations, Proviſions, Commenda retinere, as it is called, and Reſervations, which was not of it ſelf a Beſtowing of a Benefice; but was only a Declaration what Dignities of Benefices he did reſerve to be diſpoſed by himſelf, and no other: Whereupon afterwards was to follow another Act of Proviſion, or Collation to give it Execution. And this he would make ſometimes by particular Benefices, ſometimes by whole Provinces, and Kingdoms, as appears before in the Extravagant of Clement the 5. And the Stat. 25 E. 3. of Proviſoes.

Proviſion made true Incumbent though in a Manner extraordinary.
This *Commenda* hath neither Matter nor Form.

Now that Proviſion did make a perfect Incumbent perpetual, as well as the ordinary Form of Inſtitution, &c. See Fitz. Na. Br. 37. C. 18. Ed. 3. 23. 41. Ed. 3. 5. and Stat. 13 R. 2 Raſtal. Proviſions 12. made againſt Proviſi-

ons to come; yet enacted, that ſuch as were in Poſſeſſion already by Pro-
Dav. 80. b. viſions, ſhould enjoy them during their Lives. Againſt all theſe Practices of the Pope of Collations, Proviſions and Reſervations, the Statute of Proviſoes did fortifie: Was the State ſo improvident as not as well to forbid theſe Commendams, being more miſchievous if they had been then known or allowed by Practice here? Or was the Pope ſo gentle as not to have uſed this Deviſe to leap out of the Laws of Proviſors, if it would have prevailed here, as he uſed it in other Countries, to defeat the Canons againſt Pluralities here, and as he did uſe in this Kingdom the Commendam retinere, becauſe it was not of the Words and Meaning of the Law, in that there was neither Avoidance of the Benefice nor Intermedling with the Patronage?

The firſt Mention that is made of the Word Commenda in Book of Law is 27 H. 8. where the Archbiſhop is ſaid to be Commendatorius Sancti Albani, which might either be in the Retinere, or elſe by an abſolute taking. The next is the Statute of 28 H. 8. cap. 16. where the Statute making mention of divers Kinds of Bulls and Briefs of the Popes, nameth (inter alia) Commendams and Trialties, and enacts, that the Party ſhall enjoy the Benefit of ſuch of them only, as might be granted by the Archbiſhop, by the Statute of 25 H. 8. So this is ſtill under the Queſtion, and argues, that all was not permitted to the Archbiſhop, that the Pope took upon him, which was plainly true in Trialties, by the Statute of 21 H. 8. and this Statute of 25 H. 8. But the Commendam in the Retinere may be made Temporary for Years, or any Time whereof the Difference is manifeſt, if their Nature and Reaſon be obſerved.

Ant. 107. Vaugh. 25. The Difference between Retinere and Capere, is no leſs than between holding and retaining that which is already mine own (which is free from all the Exceptions before taken to the other Kind) and the taking that which is another Man's, and therefore take the Caſe, that I am already benefic'd by Preſentation, &c. in ordinary Form, and I would take alſo a Biſhop-
Ant. 107. rick, which of his own Nature would avoid the Benefice, wherefore I obtain a Diſpenſation, that I may hold this Benefice for three Years, though I take the Biſhoprick, which then I take: I remain the ſame Parſon ſtill of the ſame Benefice, in no leſs Eſtate than I had before, and here is no Injury done neither to Church nor Patron: For though it be damnum, yet it
Cr. Jac. 692. is abſque injuria. Now when three Years are paſt, the Benefice voids, as it ſhould have done at the firſt, if there had been no Diſpenſation; like unto Fee-ſimple warranted for Life, though the Warrant be Temporary, yet the Thing warranted, and to be recovered, in Value is Perpetual; for it is a Warranty of a Fee, though not a Warranty in Fee. So the Commen-
Co. L. 383. b. 387. a. dam retinere, &c. is of a Perpetuity though it ſelf be not perpetual. And of the Allowance of this in Books, ſee the famous Caſe of An. 11 H. 4. 79. upon the Common Law and Statute Proviſors, both Fitz. Na. Br. 36. and Jo. Parkhurſt's Caſe, M. 6. and 7 Eliz. Dyer 233. And Holland's Caſe, Co. lib. 4. 75. Dav. 77. a. b. 78. a. 4 Co. 79. Palm. 478. 2 Cro. 691. Winch. 94.

Now though the Statute ſeems to give Power over all Diſpenſations granted at Rome, wonted and unwonted, and all Diſpenſations generally; yet it muſt have Conſtruction, ſuch as were allowable and allowed by the Laws and Practice of this Realm, for elſe it ſhould make our Yoke heavier than before: And the Statute meant not to create new Powers unlimited, but to tranſlate from the Pope to the Archbiſhop, with Reſtrictions, as was obſerved before. Now though the Pope did ſometimes attempt to grant Diſpenſations againſt the Laws of the Realm, and perhaps added Fulminations, yet they were but bruta fulmina and minæ inermes, and Idola conceſſionum. For they are no Grants indeed that have no Force, and therefore againſt the King's Grant you may plead non conceſſit, if it were not his to grant. Co. lib. 6. 15. And therefore the Defendant here hath averred, that the like Commendams were granted to the Biſhops of this Realm, before the Statute, which the Plaintiff hath by Proteſtation denied. But the Averment is vain, if the Law judge the Contrary, as is his Proteſtation alſo, that this Commendam is not againſt the Statute of 21 H. 8. of Pluralities.

The

The ſixth Reaſon upon the firſt great Point. Cap. 13.

The ſixth Fault that I Aſſign in this Commenda is, that it is againſt the Statute of 21 H. 8. of Pluralities, touching which, and the Proviſion of this Statute 21 H. 8. cap. 25. to preſerve it, I will explain my ſelf the more largely, becauſe we are now upon a Point that may utterly Defeat that Statute, which was a moſt religious and politick Church Law, and I may ſay almoſt a Redintegration of thoſe Holy ancient Canons, and a Reſtoration of the Church, ruined by the Popes Tot quots, Diſpenſations and Toleratiōns; for though this be in the Caſe of Biſhops, which can be but rare, yet like Diſpenſations may be granted to any common Churchman to take in Commendam Ten Benefices to hold for Years, or ſo long as he ſhall hold another Benefice whereof he is perfect Incumbent. For obſerve, the Scope of this Law was to appropriate to every Flock his proper Paſtor, both in Body and Mind; in Body, that he ſhould be the Husband of one Wife; Una Eccleſia unius Rectoris: In Mind, that having but one Benefice (ſaving ſome ſpecial Favour and Conſideration) he ſhould not Farm, Graze, nor mingle himſelf with Secular Affairs, that might withdraw his Mind. The Policy of this Law I obſerve in this, that the Time now at this Parliament inclining againſt the Pope (for 21 H. 8. was that Parliament that continued 25 H. 8.) yet they did not ſtraightway take away from the Pope the Power of Diſpenſing Pluralities (which was one of the greateſt Enormities of his Power, and was pellis introitus of his Coffers) but they provided, that his Diſpenſation ſhould not be ſufficient of it ſelf; but muſt only ſecond a Qualification, which ſhould come from Lords and great Men, whereby the King did draw them to his Part from the Pope, by dividing his Power in this among them.

Now touching this Statute; I agree clearly, that Biſhopricks are not within the Law under the Word (Benefices) ſo that if a Parſon take a Biſhoprick, it avoids not the Benefice by Force of this Law, but by the ancient Common Law, as it is holden, 11 H. 4. 60. but I hold it is as clear, that if a Biſhop have or take two Benefices, Parſonages, or Vicarages, with Cure, either by Retainer, or otherwiſe de novo, he is directly as to thoſe Benefices within the Law; for he is to all Purpoſes for thoſe not a Biſhop (whether it be in his own Dioceſs or not) but a Parſon or Vicar; and by that Name muſt ſue, and be ſued, and Preſcribe and claim, for the Words are Plain. If any Parſon having one Benefice with Cure, &c. take another, &c. whoſoever will hold two Benefices, muſt have both ſuch a Qualification, and ſuch a Diſpenſation, as the Law 21 H. 8. requires. And thereupon I am of Opinion clear, that if a Man be qualified Chaplain to any Subject, and then be made a Biſhop, his Qualification is void, ſo as he cannot take two Benefices de novo after, by Force of that Qualification, but if he had Lawfully two Benefices before his Biſhoprick, he may, by Diſpenſation of Retainer (beſides his former Diſpenſation, to take two Benefices) hold them with his Biſhoprick. And if a Man, being the King's Chaplain take a Biſhoprick, I hold, that he ceaſeth to be the King's Chaplain; and Biſhops are not in that reſpect Chaplains to the King, within the Meaning of this Law. So that the Clauſe of the Statute, that gives the King Power to give as many Benefices as he will, of his own Gift to his Chaplain, will not ſerve them.

Now where it was objected, that this Commendatory is not within the Statute of 21 H. 8. for two Reaſons: First, becauſe being but Temporary, he neither is, nor can be inducted, which the Law requires. The ſecond, that Clifton was the later Benefice received, and therefore it ſhould be Southfleet, and not Clifton that ſhould avoid. 4 Le. 247.

I anſwer to the firſt, that it is the Office of Judges to advance Laws made for Religion, according to their End, though the Words be ſhort, and unperfect, Magdalen College's Caſe. Otherwiſe if a Man take Twenty Benefices, and enter and take the Profits of them all, but take no formal Inſtrument of Induction, he ſhall be out of the Law, Durus eſt hic ſermo; and ſo that Statute Sect. 4. it hath only theſe Words, really intituled or poſſeſſed, and hath not the Word of Induction. And Sect. 15. it is provided, that a Benefice Appropriate ſhall not be taken a Benefice with Cure within the Law,

Law, elſe it had been; yet it hath no formal Induction, but it gives Poſſeſſion without Induction, and ſo doth this.

But another clean Anſwer is, that the main Scope of this Law is to avoid and diſable all Licences, Diſpenſations, Unions, Colerations, and other Faculties whatſoever from Rome, or elſewhere, whereby any ſhould be enabled to take, receive, or have any more Number of Benefices, or in other Coke lib. 4. 79. Form than is preſcribed by that Act. Now as it is judged in Digbie's Caſe, a Benefice is taken, received, and had by Inſtitution only; and therefore a Qualification, or Diſpenſation following comes too late.

Why then obſerve the Conſequence, if a Man having one Benefice with Cure by Inſtitution only, accept another by Inſtitution only, without Diſpenſation; the Common Law makes Avoidance actual if the Patron will. Now if this Diſpenſation to take Benefices without Number be utterly void by the Law, then are theſe Benefices taken without Diſpenſation, and ſo void, eſpecially being by a Biſhop. And I hold, if a Man take a Trialty which is not allowed him, he cannot by that take two Benefices, becauſe his Diſpenſation is void.

3 Cr. 351. Alſo I am of Opinion, that if a Man have a Benefice with Cure worth above eight Pounds, he cannot without Qualification and Diſpenſation procure another with Cure to be united to it after, though they make but one Benefice; for this Cautel of Union is provided for by expreſs Name. But of Unions before. I am of another Mind, and Tollerations are alſo excluded, which is a proper Word for this Caſe of Commendam temporary; for it is not allowed, but tollerated, non præcepto, ſed permiſſione, as the Canon ſpeaks.

Having ſpoken thus much of the Statute of 21 H. 8. Now obſerve how Jealous this Statute of 25 H. 8. is, that nothing be done by it to the Prejudice of the other: and therefore the proviſo for the Preſervation of it is inculcate with a Triplication; and as Solomon ſaith, Funiculus triplex non
1. facile rumpitur. This Act ſhall not extend to repeal, or derogate, &c.
2. Nor to give Licence to take, receive, or have any more Number of Benefices, &c.
3. That the Act of 21 H. 8. ſhall ſtand good in all Intents, according to the true Meaning, &c. Now this Commendam croſſeth all theſe Points; and namely, it gives Power to take and receive (which are the very Words of the Statute) without reſpect of Time, more, or leſs, one, or more Benefices with Cure, and the ſame to enter and take, and have the Profits, &c.

This alſo gives Anſwer to the ſecond Objection, that Clifton ſhould not avoid: For I hold (as I have ſaid) that a Biſhop by Diſpenſation may Vaugh. 25. Accord. retain as many Benefices as he had Lawfully before, but can take none of new (if he had his Number before) for the Words are as well againſt having of Benefices, as taking, And if he had none before, then he can take but one de novo, except by Qualification he can be a Chaplain, and alſo by a double Diſpenſation have Licence to take two Benefices, and hold them with a Biſhoprick.

The ſeventh Reaſon upon the firſt Point. The laſt and ſeventh Fault that I Aſſign in this Commendam is, that though there be a Latitude of Diſcretion left to the Archbiſhop, yet he is circumſcribed with theſe Cautions, Sect. 3. that the Diſpenſations be Neceſſary and Convenient in the Caſe of the King himſelf; and the ſame Section hath theſe Words, which in Caſes of Neceſſity may Lawfully be granted; and Sect. 12. ſpeaking of the Refuſal of the Archbiſhop to grant Diſpenſations, it is added, that of a good, juſt and reaſonable Cauſe ought to have the ſame; for it is not Diſcretion cum ratione inſanire.

The Stat. Sect. 3. gives the Archbiſhop the Examination of the Cauſes and Qualities of the Perſons, procuring Diſpenſations; and therefore if he affirm the Cauſe juſt, as the Exility of a Biſhoprick, or the Quality of the Perſon worthy, againſt theſe there ſhall be no Exception nor Averment by Court, or Party; yet this point is very imperfect in the Plea; for the Diſpenſation doth not affirm it aſſertive, as they ſpeak, that the Biſhoprick was inſufficient, but that the Biſhop's Petition did ſo inform.

But

But now the Diſpenſation may be ſo groſs and palpably unneceſſary and inconvenient, as no Liberty of Diſcretion can defend it. Suppoſe it were a meer Tot quot, and yet that was common with the Pope: But this Statute hath not given it to the Archbiſhop, and yet it is no otherwiſe reſtrained, but by theſe Words, and the Statute of 21 H. 8. and this Commendam is almoſt as ill, Infinitum in jure reprobatur, It was infinite in Nature of Dignities and Benefices, in Place where, in Time when, in Order how they ſhall be gotten or holden, in Number, for they may be Twenty or Thirty ſmall, or Ten very good: I ſuppoſe that there were not many worſe in the Time of Popery. This is like the Fraud that is called Apparent, where the Father infeoffs the Son and Heir, 33 H. 6. 14. the Lord may enter upon the Heir, not ſo upon a Feoffee without Proof convenient, Eſt quiddam perfectius in rebus licitis. So Saint Paul, 1 Cor. 10. 23. All Things are Lawful, but all things are not Expedient. And this is finely ſpoken by Tully, Eſt aliquod quod non oportet, etiamſi licet; Quicquid vero non licet, certe non oportet.

See Mildmayes Caſe, Co. lib. 1. 177. A Leaſe for 1000 Years was diſſallowed, though a Power were reſerved to limit any Eſtate for Years, for any reaſonable Conſideration, as to him ſhould be thought good, yet the Land was his own before, 4 Ed. 2. F. Waſt. 11. A Leaſe of an Houſe and Land, Et quod poſſit commodum ſuum inde facere meliori modo, quo ſibi viderit expedire, ſine contradictione aliqua, yet he may not pull down the Houſe; for there is nothing more contrary to Liberty, than Licentiouſneſs, nor to Diſcretion, than Fooliſhneſs. In maxima potentia, minima licentia. Saluſt.

And now for the other Word of the Statute, that is to ſay, neceſſarie, Lex neceſſitatis eſt lex temporis, ſcilicet inſtantis. And therefore it is well ſaid, neceſſitas legum vincula irridet. But this is, when you may perceive the Caſe brought to extream Neceſſity then when the Act is done, the Law permits you not to kill him that aſſails you, when you draw near your laſt Refuge, becauſe you foreſee that you ſhall be driven to it, but you muſt forbear 'till that Neceſſity be at his full Period, for 'till then it may be otherwiſe prevented or remedied. So I am of Opinion, that if a Commendam were granted to a Biſhop of a poor Biſhoprick of a Church certain, now full, to take Effect when it ſhould fall void, that it were not warranted by this Statute; for it muſt be certainly neceſſary and convenient when it is granted. And here before the Church is void, he may have a better Biſhoprick, or that Biſhoprick may be bettered. Ant. 144.

Now to the ſecond great Point, whether the Patent of the King, called his Preſentation, ſhall be judged to have the Force of a compleat Commendam in it ſelf, or ſhall only ſerve to give his Conſent as Patron to the Diſpenſation, before made by Force of the Statute, as was pretended; that is the Queſtion. The ſecond great Point.

It is firſt to be confeſſed, that the King hath Power to do both, tell what both are; and therefore had Election to do the one, or the other, or both, at his Pleaſure.

Now in caſe of Elections, where an indifferent Act may be taken divers ways, let us in a Word ſee how they ſhall work either by the Act of the Party, or Diſpoſition of Law. Election. Co. L. 145. a

And firſt, if your Act may work two ways, both ariſing out of your Intereſt, Election is given to the Patient to uſe it either way, as Sir Rowland Heyward's Caſe, 37 Eliz. Co. lib. 2. 35. He was ſeiſed of the Manor of Ditton, whereof the Demeſnes were Part in his Poſſeſſion, and Part in Leaſe, and did demiſe, bargain, and ſell the ſame to Warren, and others, for 17 Years after his Death; and it was reſolved by the Judges in the Court of Wards, that the Leſſees might uſe this, either as a Common Leaſe, or as a bargain and Sale; but not both ways to one intire Act, and one intire Thing. 2 Cr. 290.

On the other Side, if the Act will work two Ways, the one by an Intereſt, the other by an Authority, or Power, and the Act be Indifferent, the Law will attribute it to the Intereſt, and not to the Authority: And ſo

ſo you muſt take it, for fictio cedit veritati. And therefore ſo it was ruled in Sir Edward Cleare's Caſe, Mich. 41 and 42 Eliz. Co. lib. 6. 17. that if a Man be ſeiſed of three Acres of Land holden in Chief, and makes a Feoffment of all to the Uſe of ſuch Perſon, and of ſuch Eſtate as he ſhall give, or diſpoſe by his Will; and after by his Will gives and deviſes all his Lands to I. S. and his Heirs, that this ſhall carry but two Parts of the Land, in point of Deviſe. And upon the ſame Reaſon is the Caſe 21 H. 7. of a Feoffment made jointly by the Feoffees, and a ceſtui que uſe.

And laſtly, where Intereſt and Authority meet, if the Party declare clearly that his Will is, that this Act ſhall take Effect by his Authority, or Power, there it ſhall prevail againſt the Intereſt; for modus & conventio vincunt legem; and therefore in the ſame Caſe of Cleare it is agreed, that if the Deviſor had recited his Power, and had relied upon that, all would have paſſed by expreſs Declaration of the Party himſelf. Nay more, though the Party do not make an expreſs Declaration, yet if his Act do import a Neceſſity to work by his Power, or elſe to be wholly void, the Benignity of the Law will give way to effect the Meaning of the Party; and therefore in that Caſe it was reſolved, that whereas Cleare was ſeiſed for Example of three Acres of Land, every one of equal Value, and conveyed two of them to his Wife, for her Jointure, and afterwards made a Feoffment of the third, to the Uſe of ſuch Perſon, &c. as before, and then deviſed that third Acre ut ſupra; that Deviſe was good by Force of the Authority; for elſe the whole Deviſe had been utterly void, having before given the other two Parts to his Wife.

Now then for the minor Propoſition, how this Caſe fits the former Rules and Diſtinctions. It is firſt to be obſerved, that the King's Patronage, and his Aſſenting to the Commendam in that reſpect, is proceeding from Intereſt: But the King's Aſſenting to a Commendam made by the Archbiſhop according to the Law, is but a meer Authority limited by that Law, and ſo far it was performed in the firſt Confirmation by him made. And the making of a compleat Commendam by the King hath an Operation out of Intereſt (if he be Patron) and though he be not Patron, yet is it not a bare Authority derived from another, but inherent in his own Perſon, amongſt other Powers and Authorities annexed, and incident to the Crown, to which the Patron muſt Conſent.

Now let us ſee what may be taken to be the King's Mind in this his Patent.

Firſt, if the King had begun with a direct Recital of the former Commendam, and then made his Preſentation, and Commendation of the Church to the Biſhop, as here he doth; Ita ut liceret, &c. ſecundum vim, &c. prædictarum literarum diſpenſationis, the Patent it ſelf, eſt cujuſdam facultatis. No Man would have doubted, but that according to this plain Declaration, and according to Cleare's Caſe, it would have wrought no more but the Aſſent and Act of the Patron to eſtabliſh the former Commendam.

Now this in Effect ſounds as much; for it concludes upon the former, which ſuppoſeth a kind of Recital of that former Commendam, in the King's thought, in the former Part, though it be not expreſſed: And the ſecundum vim, &c. is full, whereſoever it is placed.

Dilemma. Now, either there was a former Diſpenſation, or none. If there were one, the King means to eſtabliſh that; if there were none, or a void one as void Cuſtoms, 5 E. 4. 14. (which is as none) the King deceived, and ſo the Act void.

Now I ask, if the Biſhop had taken his 200 Marks a Year before, whether by this Patent of the King he might have taken this over and above?

Clearly no; for he muſt take it ſecundum vim, &c. And the Biſhop in pleading hath acknowledged that; for he avers, that all his Livings are under that Value.

Alſo he pleads that the King by Force of his Lapſe did make this Patent, &c. ſc. ratione prærogativæ ſuæ Regiæ, per lapſum temporis, ſibi devolut. per Literas ſuas Patentes, &c.

Now

How this general Power to make Commendams is in all Caſes alike; but his Intereſt to eſtabliſh a Commendam of the Archbiſhops is only by Force of his Patronage, which he hath by the Lapſe in this Caſe, and upon that he hath relied.

Laſtly, obſerve the Frame, and it is clear, that the King had no Purpoſe, neither hath the Patent the Tenour of an immediate Commenda; for it doth conſiſt but upon three main Clauſes, whereof there is but one that is Clauſula conſtitutiva, and the other two are Clauſulæ conſecutivæ, or conſequentes.

The firſt is, that the King doth preſent him, and commend, give and grant the Church to him; this doth conſtitute, preſent, and commend the Church to him Actually, and this was proper and neceſſary for the King to do, as Patron, to give Force and Effect to the firſt Commenda, and the Words are apt enough to impart his Aſſent effectual: And ſo it is in the Caſe of Heale, againſt the Biſhop of Exeter, 43 Eliz. No. Entr. 473.

The ſecond Clauſe which muſt make the Commenda immediate, or none, is not a ſubſtantive, or conſtitutive Clauſe of it ſelf in this Form; Et inſuper conceſſit Dominus Rex eidem Epiſcopo, quod ei bene liceret, which yet would have been much checkt by the Clauſe of that Sentence, ſecundum vim, &c. But it is clean contrary thus, Eccleſiam Commendavit, & conceſſit ita, ut eidem Epiſcopo bene liceret, &c. Secundum vim, &c. Which amounts but to this; that the King commended the Church unto him, being his by Lapſe, to the End to enable him to have it in Commenda, or ſo that he might have it in Commendam by Force, and according to his former Diſpenſation: There can be nothing more clear.

The laſt Clauſe ad quam rem, &c. ad debitum effectum perducendum, had no Colour at all to make an abſolute Commendam, for it doth not pretend to make any new Thing, but to bring that to Effect, which was before ſpoken of, ſee the Caſe, H. 3 & 4 Phil. & Mar. Dyer 141. King H. 8. appointed by his Will, that the Lady Mary ſhould have Land to hold ſo long as ſhe ſhould keep her ſelf Sole, E. 6. granted them unto her for Term of her Life, ſecundum tenorem Teſtamenti, H. 8. She granted a Rent out of them; and then E. 6. died: A Quære is made, What ſhall become of the Rent which depends upon the Validity of her Eſtate, and that upon Deceit to the King, or not; but clearly, if there had been no Will, the Eſtate would have been void; for the King was deceived; ſo here, if the firſt Commendam be void. 4 Le. 140.

So the Caſe of the Abbeſs of Sion, 38 H. 6. 33. the King ſeiſed of a Manor with the Advowſon appendant, granted the Manor to I. S. for Life, and then granted the Manor to I. D. after the Death of I. S. habendum una cum advocatione. And then by Parliament the King reciting both the Grants, confirmed them by Parliament, yet the Advowſon paſſed not. 5 Co. 11. b. Poſt. 231.

As to the third great Point, whether this Commendatory might be admitted to plead to a Quare Impedit at the Common Law, or by the Meaning of the Statute of 25 E. 3. cap. 7: pro Clero Stat. 3. whereof read the Words of the Preamble and Body (where the Ordinary gives a Benefice rightfully by Lapſe) ſo that is the Caſe of a perfect Incumbent, which he calls a Poſſeſſor; and then enacts, that the Ordinary or Poſſeſſor, in all Caſes like, ſhall be received to counter-plead the Title, and to defend his Right, although they claim nothing in the Patronage. The third great Point. Dy. 1. b. 7 Co. 26. a. Poſt. 163, 379. Jones 161.

Firſt note, that the Miſchief of the Commendatory, for not being admitted to plead, ought to move no Man; for the very true Incumbent was in that Miſchief 'till this Law: So that if the Statute did not relieve this kind of limited Commendatory (whereof, as I have ſhewed you, no Law or Practice ever took Knowledge before, nor after that Statute) that he hath no Cauſe to complain.

Note, that if a Commendatory were not in Law a Poſſeſſor of a Benefice, that is, an Incumbent at the Common Law, then is he not relieved by the Statute; for it makes no new Poſſeſſors, but gives the old Leave to plead; if he were a perfect Parſon, he were within the Pluralities at the Common Law and Statute, 21 H. 8.

Now let it not ſeem unreaſonable that he ought to hold his Poſſeſſion, and yet he may be ſo diſabled to plead in ſome ſort, that being ſued, he cannot defend himſelf; for if every Man might in every Caſe alike, plead what he would, and in what ſort he would, pingui Minerva, it might be better called Talking at the leaſt, than Pleading. And Lit. cap confir. 123. it ſhould ſeem had little Underſtanding to admoniſh his Son, that it is one of the moſt honourable, laudable, and profitable Things in our Law, to have the Knowledge of well pleading in Actions real and perſonal, and therefore counſelled him, demitter ſon courage & cœur de ceo apprehend. And there is (as Bracton ſays) a great Reſemblance between pugna militaris & civilis. And therefore as in a Battle you will not put every kind of Weapon into every Man's Hand, nor appoint all Men confuſedly to all Services; but ſort Men according to their ſeveral Faculties, and appoint to every Man his own Station, which he muſt ſtand, and not leap into another Man's Place though with Hope of Succeſs (which if he do with Succeſs, yet he deſerves Death by the Martial Diſcipline, whereof the Romans were the great Maſters and Teachers:) Much more exactly does the Law aſſign to every Perſon in this Civil War his proper Action and Office, according to the Propriety of his Caſe and Faculty. And therefore at the Common Law, the Incumbent, or any other that claimed nothing in the Patronage, could not counter-plead the Title of the Plaintiff in a Quare Impedit, becauſe that was for Title to the Patronage, wherewith he had not to do. And it was againſt Reaſon, that any Man ſhould contend for that he neither had nor claimed: The Bailiff in Aſſize cannot plead a Releaſe, but ſhall be holpen by Certificate of Aſſize. And therefore, firſt the very Party to the Suit in the Caſe directly his, and the Point proper to him, if a Releaſe be made unto him between Verdict and Judgment, cannot plead it, becauſe he hath no Day in Court, but muſt help himſelf by Audita Querela.

7 Co. 26. a. 1 And. 238, 255.

Cr. Car. 232, 236. Cr. Jac. 646. N. B. 114. a.

And therefore to put you but one Caſe before the Statute, and one Caſe after to prove this, 18 E. 3. 23. the King brought a Quare Impedit againſt the Prior of Dureſme, and his Incumbent, and claimed by a Grant of the next Avoidance from the Prior to him, which was no Plea without ſhewing it; but the Prior confeſſed it, and the Incumbent demanded Judgment, becauſe the King ſhewed no Deed of the Grant; which Exception was diſſallowed.

Then he pleaded, that the Prior made no ſuch Grant, which the Prior whom it concerned, had confeſſed; and both were adjudged againſt him, becauſe he claimed nothing in the Patronage, ſo that it lay not in his Mouth to plead; and therefore the King had Judgment, and yet the Miſchief of the Incumbent was objected.

Since the Statute of 31 E. 3. Fitz. Incumbent 6. the King brought a Quare Impedit againſt the Archbiſhop of Canterbury, and his Vicar, and made Title by Avoidance, while the Temporalties were in his Hands. The Archbiſhop confeſſed it, and the Vicar denied it, which Plea he was to be admitted unto by the Statute, if he were Incumbent; whereupon for the King it was ſaid, that the Vicar had reſigned, hanging the Writ. And though it were excepted, that the King ſhould not be received to ſay ſo; yet it was judged for the King, becauſe he could not be received by Common Law, as aforeſaid, nor by the Statute, becauſe he was no longer Poſſeſſor. But 13 H. 4. 7. it was reſolved, that without making Title to the Patronage, a Man may ſhew as Amicus Curiæ, falſe Latin, or other Matter appearing within the Writ; for indeed that is no pleading, but remembring the Court of that of which they ſhould take Knowledge, of Office: And one Plea, which in Effect is the general Iſſue in a Quare Impedit, Ne diſturba pas, every Defendant may plead without more, becauſe it doth but defend the Wrong wherewith he ſtands charged, and leaves the Plaintiff's Title not controverted, but in Effect confeſſed; who may therefore upon that Plea preſently pray a Writ to the Biſhop, or (at his Choice) maintain the Diſturbance for Damages. Of this Form of pleading in Law, there is one Reaſon common to other Actions, wherein Title is contained to the Land in Queſtion, ſpecially, which is, that the Tenant ſhall never be received to counterplead,

Vaugh. 58. Accord.

Mo. 385. Ant. 103.

terplead, but he muſt convey himſelf, by his Plea, a Title to the Land and ſo avoid the Plaintiff's Title alledged by Traverſe, or Confeſſing and Avoiding. But in the Quare Impedit, there is a further Reaſon; for both Plaintiff and Defendant are Actors one againſt another; and therefore the Defendant ſhall have a Writ to the Biſhop, as well as the Plaintiff, which they cannot have without a Title appearing to the Court. And therefore, if the Defendant never appear, yet the Plaintiff muſt make a Title for Form's ſake, and ſo muſt the Defendant, if the Plaintiff be Non-ſuit. And upon the ſame Reaſon it is, that if an Aſſize be brought againſt the Diſſeiſor and Tenant, the Diſſeiſor can make no Uſe of the Releaſe of Actions real made by the Plaintiff to him, becauſe he hath nothing to do with the Realty, and yet it is an intire Action, mixt of the Realty and Perſonalty, but hath ſeveral Reſpects to ſeveral Perſons, whereas (if the ſame Perſon were both Diſſeiſor and Tenant) it were good. If the Plaintiff demur upon it, he Confeſſes not. Vaug 3.

So if a Vouchee enter into Warranty, the very Tenant can no longer plead, but the Tenant by Fiction of Law muſt plead.

Now the Statute ſays, he muſt be the Poſſeſſor that muſt plead. Now it is well ſaid, aliud eſt poſſidere, aliud eſt in poſſeſſione. And it is confeſſed unto me, that the Commendatorius ſemeſtris is not within the Law; and yet he is in a ſort in Poſſeſſion; for by a Canonical Title, or Allowance, or Commiſſion, he doth gather the Fruits and ſerve, or cauſe the Cure to be ſerved, and take and diſtribute the Fruits accordingly, and is no Intruder.

But becauſe the Statute hath always been expounded of a natural and compleat Incumbent, both to the Spiritual Cure (which is attained by Admiſſion and Inſtitution only) and to the Temporalty alſo, by Induction, as the Books and Pleadings are clear: Therefore can no Commendatory for ſix Months, nor for ſix Years, nor for leſs Time than for a Perpetuity, whereby he may be made a perfect Incumbent, Rector of the Church, and ſeiſed in Fee to him and his Succeſſors, be within the Word or Meaning of this Law; for there is no Difference between the Commendatorius ſemeſtris, or for Years, or limited Eſtate, but that this latter Commendatorius hath a Clauſe to make the Fruits his own, but not to make him Rector of the Church, which is the Eſſence of an Incumbent, as is well agreed in Grindon's Caſe, and upon my Argument before hath fully appeared. Dy. 1. b. 7 Co. 26. a. Ant. 161. Poſt. 319. Jones 161.

Now to the fourth Point, Whether the Demurrer of the Plaintiff doth work ſuch a Confeſſion of the Plea of the Defendant, that the Church of Clifton did not avoid by the Death of Walkenden but by taking of Yelvertoft, and ſo the Lapſe accrued to the King, whereof the King (though no Party to the Suit) may take Advantage according to the Rule of the Books. It is ſo clear contrary, as it troubles me to make or offer Proof of it. The fourth great Point.

For there is no Diſpute of things manifeſtly true or falſe; for all Argumentation is à notioribus.

Now if the Thing it ſelf be notiſſimum, we muſt make new Comparatives upon Superlatives, Multum valet ad ſeipſam perſuadendam ipſa evidentia veritatis, nec uſquam ſic non invenio quid dicam, quam ubi res de qua dicitur manifeſtior eſt, quam omne quod dicitur. Auguſt.

I do firſt agree, that a Quare Imped. between two Strangers, if in the Debate of the Cauſe, either by pleading or Confeſſion of the Parties, it appear to the Court, that neither of them hath Right, but that the Preſentation belongs to the King, the Court may, nay they muſt award a Writ for the King to the Biſhop; and that without Prayer on the Part of the King, for the Court and Judges are of the King's Counſel: But this muſt be where the King's Title appears ſo clear in allegatis & probatis, to the Court, as it is certain and infallible both againſt Plaintiff and Defendant, 16 H. 7. 12. Fineux dit que in ceo cas doit eſſe adjudge pur le Roy & 12 H. 7. 12. Mordant dit que eſt common caſe: & 11 H. 4. 71. adjudge per Hank & Hill ſi clare title appeart al Roy, come per les parties in plea pleadant Fitz. Nat. br. 38. G. And therefore I will cite you a Caſe lately adjudged in the Common Pleas, M. 14 Ante. 127. Cr. Car. 502. Cr. Jac. 216. Mo. 872. Ant. 127.

Vide in ſimilar Caſe, 126. Ant. Mo. 872.

jac. Regis, Rot. 647. A Quare Impedit was brought by the Chancellor, Maſters and Scholars of Cambridge, againſt Sir Edward Walgrave and others, of the Church of Colney in Norfolk, and declared, that Henry Yaxly Eſquire was ſeiſed of the Manor of Eaſt-hall, ad quod, &c. and was a Popiſh Recuſant Convict, and the Church void, &c. Walgrave confeſſed the Title of Yaxly; but ſaid, that he paid not his Twenty Pounds a Month, whereupon two Parts of the Manor ad quod, &c. were by Commiſſion ſeiſed into the King's Hands, and that he granted the ſaid two Parts, with the Apurtenances to him for one and Twenty Years, ſi tam diu, &c. Now though by the Defendant's Plea, the King's Title did appear againſt him, yet the Plaintiff was demanded by the Court what he could ſay, &c. who confeſſed the King's Title according to the Bar, and diſclaimed in their Title; and ſo a Writ was awarded to the Biſhop for the King. Now in this Caſe there is no other Confeſſion againſt the Plea of the Title ſet forth for the King, than ſuch as may be inforced out of the Demurrer of the Plaintiff, upon the Defendant's Plea.

3 Cr. 197. 1 Le. 4. Poſt. 199, 233. 11 Co. 5. b. 45. a. Poſt. 251. Co. L. 72. a. Poſt. 279. Cr. Car. 239. Styl. 15. Mo. 28. Ant. 133. 11 Co. 45. b. 3 Co. 1. b. 1 Cr. 55. Plo. 84. b. 3 Cro. 30. 1 Leon. 41. 3 Leo. 77.

Now there is a great Difference between a direct Confeſſion of the Party by a bene & verum, &c. and a nient dedire, or a Demurrer, that is between a direct Confeſſion of the Party againſt himſelf, and an Admittance by Implication, or a Verdict finding it, or the like, as in 2 H. 7. 16. If a Man bring an Action of Treſpaſs againſt A. quod ipſe ſimul cum B. & C. did the Treſpaſs, and doth not ſue them all, his Writ ſhall abate; and if he bring his Action againſt A. and he plead the Treſpaſs done by him and B. and that the Plaintiff releaſed to B. and the Plaintiff traverſe the Releaſe, yet his Action ſhall not abate, ſo 9 H. 7. 3. If a Man avow for two Rents, and the one of his own ſhewing appears not due, the whole Avowry is vicious; otherwiſe, if it were ſo found by Verdict.

4 Co. 79. b.

Again, here the Point (whereof Advantage would be taken as confeſſed) is by way of Proteſtation denied, that is, that Walkenden the Incumbent did not accept Yelvertoft, nor was inducted in the ſame, and then there was no Avoidance of Clifton, being the former Benefice; and conſequently in Lapſe. And if it were no Avoidance by that Law, it could not fall into Lapſe by the ſimple Plurality, without Notice to the Patron, which is no where alledged.

Laſtly, becauſe the Law requires in every Plea two Things, the one that it be in Matter ſufficient; the other, that it be deduced and expreſſed according to the Forms of Law, if either the one or the other of theſe be wanting, it is Cauſe of Demurrer.

And as all Policy and Order inſtructeth a Man, firſt to ſkirmiſh and practice ſome ſlight Defeats before he join Battle; ſo we begin firſt with Pleas to the Juriſdiction of the Court, then to the Perſon, then to the Writ, then to the Action of the Writ, and then to the Action it ſelf. And upon all Demurrers the Arguments begin ever with the Points of the Form, becauſe they ſpeak to the Matter of Law. And ſee the Earl of Leiceſter's Caſe Plo. Com. 400. in the King's Bench, where the Judgment was drawn up by the Clerk, quod placitum prædicti Ch. Heydon modo & forma prædictis placitatum minus ſufficiens in lege exiſtit, &c. which was ſaid to be the Form in that Court; yet becauſe the Counſel ſaid, that they demurred as well for Matter as Form, at their Requeſt the Court ordered that the Entry ſhould have the Clauſe, materiaque in eodem contenta minus ſufficiens, &c. as it is uſed in the Common Pleas.

And obſerve, that the Demurrer in this Caſe is, Quod placitum prædicti Epiſcopi modo & forma, prædict. placitatum & materia in eodem contenta minus ſufficiens, &c. ab actione ſua præcludend. quod ipſi ad placitum illud modo & forma prædict. placitatum neceſſe non habent nec per legem tenentur reſpondere, & hoc, &c which falls full to this, that whatſoever the Plea is, they are not bound to anſwer it in Form, as it is pleaded; and therefore it were Madneſs for them, by anſwering it, to allow it good, and make themſelves anſwerable to it. And note, if the Defendant here be no Poſſeſſor within the Statute, then his Plea is as none, not for Inſufficiency of Matter, but for Incompetency of the Perſon Pleading, which is the Cauſe of Demurrer.

After

After all the Judges had argued, we aſſembled in Serjeants Inn, the rather becauſe the King deſired there might be a Conference, where it was found and agreed (as I obſerved in the beginning) that ſeven of us had delivered our Opinion that Judgment was to be given for the Plaintiff; and that the other five were againſt the Plaintiff, either as for the King or for the Defendant. Mich. 13 Jac.

So it was agreed by us all, that Judgment ſhould be given for the Plaintiff Quod habeat breve Epiſcop. Nevertheleſs becauſe Crooke (who was one of the ſeven for the Plaintiff) had adviſed in the End of his Argument, that Knowledge ſhould be taken of the Truth of the King's Title (being as it is diſcloſed, and in ſome ſort either admitted or not denied) before Execution ſhould be awarded; we alſo all thought it juſt, both for Matter and Form of Unity, that all Parties ſhould be called, and the State of the preſent Avoidance and Plenarty underſtood.

Whereupon Judgment was this Michaelmas Term entred, quo querente quod habeat breve Epiſcopo; and Order given, that no Writ ſhould go forth, neither to the Biſhop nor to the Sheriff, to enquire of the Points of the Writ, 'till the Court gave further Order.

(194) Benedict Winchcombe *againſt the* Biſhop of Wincheſter *and one* Richard Pulleſton. *Quare Imped.*

Paſch. 14 Jac. Rot. 1026.

BEnedict Winchcombe brought a Quare Impedit againſt the Biſhop of Wincheſter, and Richard Pulleſton; and the Caſe was this, that one William Waller being ſeiſed of the Church of Leck-ford, and Watton being Incumbent of it, and a Man grievouſly pained with the Strangurie, and like every Day to die, Say bargained with Waller for 90 l. that he ſhould preſent, or cauſe him to be preſented, whenſoever the other died. And for the better and ſure effecting thereof, it was agreed between them, that Waller ſhould grant the next Avoidance unto one John Ebden, a ſpecial Friend of Say's, upon Confidence, &c. Which was done accordingly. Then Watton the Incumbent died, and Ebden, in Execution of the Simoniacal Agreement aforeſaid, preſented Say, who was admitted, &c. And then Waller granted the Manor and the Advowſon to Winchcombe the Plaintiff, for Years. Say died, the King preſents Pulleſton, who is admitted, &c. And Winchcombe brings the Quare Impedit againſt the Biſhop of Wincheſter, and him who pleaded all the Matter of Simony aforeſaid, as Parſon imperſonee; whereupon Iſſue was taken and found for him. The Queſtion made by the Plaintiff in Arreſt of Judgment was, whether the King or Winchcombe have the Right to this Preſentation, which depends wholly upon this, whether the King's Turn growing by Reaſon of the Simony, be ſatisfied by the Preſentation, &c. and Death of Say, that came in by the Simony. Stat. 31 Eliz. Simony expounded. Jenk. Cent. 300. Poſt. 193. 1 Brnl. 164. Noy. 22, 25. Winch. Ent. 884. Moor. f. 877. 31 El. cap. 6. Co. L. 120. How the Kings Title begins and continues by it. Mo. 916. Cr. El. 685. Winch. 63. Degg. 54. Poſt. 167.

This Caſe, after divers Arguments at the Bar pro & contra, was argued by us, at the Bench openly and at large. And we all four agreed, that Judgment was to be given for the Defendant, that is to ſay, for the King's Title by the Simony. And Hutton, now this Trinity Term, being come newly to the Bench, having been before for the Plaintiff, was now of Opinion with us, and ſo argued. My own Argument I ſet down, which was thus.

It is againſt Nature, that any thing ſhould be both void and not void at once, but to ſeveral Reſpects it may be.

As at ſeveral times. If I bargain and ſell to A. and before Inrollment, do bargain and ſell the ſame to B. which is inrolled, now this Eſtate is good. But if that to A. be after inrolled in due time, the other is ipſo facto void. 1 Cro. 218, 284, 357. 4 Co. 71. a. Poſt. 221. Cr. Jac. 52.

A Thing may be void to one Purpoſe, and not to another; as if one ſeiſed of a Rent be bound in a Statute, and the Rent be releaſed to the Tenant of the Land, it is utterly of it ſelf extinct and void, but yet as the Cognizee, &c. And for his Execution it is in Being, Cok. lib. 7. 38. Lillington's Caſe.

4 Co. 76. a. A Thing may be void or not void, at the Election of him whom it Concerns, as in Holland's Caſe, Anno 9 and 10 E. 3. If a Man having one Benefice take another without Diſpenſation, though he be not inducted, and ſo

4 Co. 79. b. Accord. not within the Statute of 21 H. 8. yet the Patron of the firſt Church may take it as void, and preſent preſently, or may leave it as full 'till Sentence of Deprivation.

Expoſition, B. 6. 2 Co. 651, 657. 3 Inſt. 32. A Thing may be void, and yet not to be avoided in every Manner; wherein I will not uſe the Example of Outlawries made void upon the Statute of 8 H. 6. which is well expounded void by Writ of Error; for ſuch Caſes are not void indeed, but voidable only; as there is a great Difference between a Writ abated, as by the Death of the Parties, and only abatable by Plea to the Writ. But a Sheriff's Bond againſt the Statute of 23 H.

Debt. 80. Plo. 66. Mo. 75, 250, 875. 5 Rep. 119. a. Ante, 72. 6. is utterly void; and yet you cannot plead non eſt factum to it, but you muſt plead the ſpecial Caſe, and conclude Judgment ſi action, or ſo not your Deed, Dive & Manningham & 37 H. 6. 1. ſo a Feoffment fraudulent ſhall be avoided by not Guilty, not by Iſſue ne infeoffa pas: vid. Caſe Humberſton & Howgall. Tr. 12 Jac. my own Reports, Sup. Gooches Caſe, Co. lib 5. 60. in Burrel's Caſe, Co. lib. 6. But the commoneſt Caſes are, that the ſame thing may be void as to one Perſon, and not void as to another, and that commonly runs upon this Diſtinction, though it be made void againſt ſome Perſon, and for ſome Purpoſe, yet it is ever good againſt the Party himſelf that made it, as are the Caſes of fraudulent Conveyances and Alienations of

Entre congeable, Br. 14. Women Tenants in Dower, or Jointreſſes upon the Statute 11 H. 7. and that is the leaſt that can be made of this Caſe. That this Preſentation, &c. made upon Simony is utterly void againſt the King, and the Church in no ſort filled by it. Which being ſo, it is repugnant in it ſelf to ſay, that it ſhall be both void and not void at once againſt the King. Now it is confeſſed, that it is utterly void againſt the King during the Life of Say, ſo that the King might preſent as to a void Church; which being granted it is abſurd to ſay, that his Death ſhould alter the Caſe; for the King cannot be diſpoſſeſſed or barred but by an Act, and the Death is a Privation but no Act: Therefore now obſerve the Error that grows by not well obſerving the Reaſons of Caſes, which are their Cauſes; for Tum demum ſcimus, cum per Cau-

7 Co. 28. a. ſas ſcimus, as Baskervil's Caſe is cited, that if the King have a Lapſe, or (as Juſtice Brown ſays in the Lord Barkley's Caſe, Plow. 249. againſt Weſton there 243. who delivers his Opinion without either Authority or Reaſon)

Cr. Jac. 54. Grant of the next Avoidance, and an Uſurpation be made upon him, and the Clerk die, now the King hath loſt his Turn. The Caſes I grant, for it is apparent, that the Preſentation made the Uſurpation and filled the Church,

Ant. 152. which the King could not undo, but by Quare Impedit after Induction: But the Death of the Incumbent did not fill the Church, but it hath ſo ſatisfied the King's Turn, as he cannot take another, becauſe ſo much is had in the King's Default, as his Turn amounts unto, and the Owner of the Advowſon muſt be no longer kept out, neither by Law in caſe of Lapſe, nor by the Grant.

1 Keb. 311. Ant. 75. 2 Cr. 385. Now this Caſe is clean Contrary; for here all the Acts that ſhould fill the Church, are made utterly void, and the preſented Incumbent diſabled to be Incumbent, even from the firſt Simoniacal Procurement, which was before the Preſentation, ſo as there was never in Law Preſentation, &c. no more than a Parſon dead to this Purpoſe in Law: Nay more, he is diſabled for ever to take that Benefice of any other Preſentation; and therefore this Si-

Co. L. 120. a. moniacal Preſentation cannot fill the Church againſt the King, as the Uſurpation doth in the other Caſes; and the Death conſummate that that was never begun: And therefore the Statute ſhould have been vainly and ignorantly penned, if it ſhould have ſaid, that the Church ſhould have been void, as if he had been naturally Dead; for in this it is, as though he had never been, as in the ſaid Caſe of Grimdon's, and therefore the Law proceeds to give it upon this Branch to the King, for that Time and Turn only, which is for that Avoidance only, which is not yet filled nor ſatisfied by this Idol or Shadow of a Preſentation.

And note the Pleading is, that Ebden preſented Say, and that he was admitted, &c. Quorum prætextu, & vigore Statuti, the preſentation, &c. were void, a kind of Repugnancy; but ſee Grindon's Caſe pleaded, Plow. 495 that the Church being full of the Dean and Chapter, Edw. 6. preſented Chamberlaine who was, &c. which Preſentation, &c. were utterly void: And note, that Caſe is like this; here the Parſon is incapable of the Church, there the Church was not capable of the Patſon; and though the Preſentation and all the Acts be made void, yet it was neceſſary to expreſs them; for without a Preſentation actual by Simony the King could not have the Turn. And if the Statute had only made the Preſentation void, and not given it expreſly to the King, it would have fallen to the Patron again, as it doth upon the Caſe of Inſtitution by Simony, and ſo the Statute ſhould have rewarded him for his Simony.

Beſides note, that in the other Caſes of Lapſe and Grant beforementioned, by Uſurpation and Death, the King had a Turn precedent, upon which an Uſurpation was, and might be made by the Preſentation, and ſo he diſpoſſeſſed; but here it is clean contrary; for the pretended Preſentation gives the King his Title, and therefore cannot alſo diſpoſſeſs him of that Title that it gives him.

For if a Patron would contract with one for Simony, and then will preſent another without Simony; the King gains nothing; ſo there muſt be an actual, though not an effectual Preſentation. But if once the Patron have preſented by Simony, the King is ſtraight-ways intereſſed (though no Admiſſion follow) by the expreſs Words of the Statute: And the Obſervation of the three ſeveral Clauſes makes the Difference of the Conſequence evident.

For the firſt, finding the Patron guilty makes his Act void, and gives his Turn to the King ab initio. But the ſecond Clauſe, finding the Patron innocent, and the Simony to begin in the Inſtitution and the Induction after, makes the Church void only from the Induction, and ſo allows this to be a Plenarty, and gives the new Turn to the next Patron; ſo upon the laſt Branch of the Statute, if a Clerk that gets Orders by Simony, obtain a Benefice Lawfully within ſeven Years it is made void: But how? From the Induction, as if he were dead, and the Patron to preſent. If either of theſe had been Ebden's Caſe, Winchcombe ſhould have preſented now: So that if a Man have a Grant of the next Avoidance, and Preſent one without Simony that were inſtituted and inducted, or got Orders by Simony; yet his Grant were executed; but in the other Caſe of a Preſentation by Simony it is truly executed, when the King preſents upon his Simony, for then is the Turn fully executed, though it were attempted before. 13 El. cap. 6. Sect. 6.

And (the Secrecy of Simony conſidered) to take this Expoſition were to fruſtrate the Law; for if the Simony be concealed 'till Death, all were ſafe, which the Statute well perceiving gives no Lapſe without Notice againſt the common Patron upon the ſecond and laſt Branches, and by the ſame Reaſon can impute no Laches to the King, for which it ſhould deprive him of his Preſentation. But I grant, if this Clerk ſhould reſign, or the like, and a new Clerk were preſented and dyed, that now the King's Turn were loſt, as in the other ordinary Caſe, and upon the ſame Reaſon. 7 Co. 28. a. 2 Cr. 216

All this is ſpoken as if this were only void againſt the King: But I hold it utterly void even to Strangers that may take Lawful Advantage of it; and therefore note the Nature of the Caſe, that is contractus ex turpi cauſa, & contra bonos mores, and ſo it is againſt Law, and void by the Statute, even between the Parties, yea, and Strangers ſhall take the Advantage of it; like as if a Man be bound in an Obligation uſurious, the Bond is void between the Parties; and therefore if ſuch an Obligor makes his Executor and die, and the Executor pay an uſurious Bond, other Creditors may ſue it and make a Devaſtavit of it. 4 Shep. Abr. 90. 3 Inſt. 153. 1 Cr. 353. 1 Brnl. 33. Noy. 7. 129. 1 Brnl. 33

So I hold in this Caſe, that if a Man be bound to a Stranger to preſent I. S. to a Benefice, and he preſent him upon a Simoniacal Promiſe with another Stranger, yet the Bond is forfeited. If the King ſhould Pardon the Simony, yet I hold clearly, that the Church ſhould ſtill remain void to Mo. 916. 1 Cro. 348. 1 Syd. 170, 222. Accord.

this

this Preſentation, even as the King's Releaſe of Uſurp will never make the Bond other than void. A Bond for Performance of Covenants, wherein if one be broken, though that be releaſed, yet the Bond is ſtill under Forfeiture. I hold alſo clearly, that if this Parſon ſue for Tithes in the Eccleſiaſtical Court, or for his treble Damages at the Common Law, that the Pariſhioners may plead him no Parſon, becauſe of the Simony; for otherwiſe, if the King ſhould preſent, and his Clerk be received, he muſt not pay both, and to whom he ſhall pay, is at his Peril, upon the Simony or not: And if the Ordinary refuſe his Plea, he may have a Prohibition, for it is made void by a Statute Law, by which the Spiritual Courts are bound: And it is much ſtronger than the Caſe upon the Stat. 13 Eliz. Whereupon it is reſolved, Dy. the laſt Caſe, that if a Man having one Benefice, accept another, and be inſtituted and inducted into the ſecond, and then read not his Articles, that yet the firſt Benefice voids not by Ceſſion, becauſe the ſecond is as not taken. And ſo in the Caſe of Norris and Eaton, it was adjudged void even to the Pariſhioners.

1 Keb. 311. 2 Brnl. 7. p. 5. Dy. 76, 77. 3 Leon. 45, 69. Cr. Car. 357. Jones, 340.

Vaugh. 133. Dy. 371. b. 2 And. 183. b. 5 Co. 102.

2 Co. 45. a.

But now I ſay, that it was void to all Men, quorum intereſt, to the King and his Incumbent, and all that claim under him, and to the Pariſhioners, to the Ordinary, and to the like; for all things that may concern that Point, and the Parties intereſſed in it.

But clearly it is not void to an Uſurper, for a Man without Right cannot preſent unto it as to a Church void, nor the Ordinary ſo diſcharge himſelf, if he receive the Clerk of an Uſurper; for he is none of them quorum intereſt.

Alſo, if one having a prochein Avoidance preſent by Simony, and his Clerk be received, he ſhall never preſent again, as taking this to be void, and ſo his Turn to remain. For as to him it is full, he ſhall not diſable his own Act, nor can have Reaſon by the King's Title to do it.

And though Winchcombe were no way privy to the Simony, that doth him no good, as to this Caſe; for the Patronage cannot come to him, 'till Ebden's Turn be ſatisfied; which remains ſtill void to this Purpoſe, notwithſtanding his Simoniacal Preſentation, 'till the King preſented Pulleſtone. After Judgment given for the Defendant, his Counſel informed, that he was not inducted though he had pleaded as Parſon imparſonee, and therefore prayed a Writ to the Biſhop for the King, or upon Surmiſe thereof, a ſcire facias for the King, why he ſhould not have Execution. But the Court denied both; becauſe they muſt be contrary to the Record: Yet Quære, becauſe the Court cannot plead unleſs he be inducted, and the King being his Patron though he be not inducted, cannot be named with him. This Point being often debated at the Bench, was at laſt in Mich. Term, Ann. 15 Jac. reſolved by myſelf and the Court, as followeth, infra, 193.

Somerſet. Waller.

(125) Stukeley *verſus* Butler.

H. 12 Jac. Rot. 827.

Moor. f. 880.

SIr Thomas Stukeley brought an Action of Treſpaſs againſt Robert Butler for felling of certain Oaks and Aſhes, &c. at old Cleave; whereunto the Defendant pleaded not guilty; and upon a ſpecial Verdict the Caſe was thus. "The Earl of Suſſex 36 Eliz. was ſeiſed of the Manor of Cleave "whereof a Meſſuage called Stout, and 100 Acres uſually occupied with it, "and 700 more, and certain Woods called Blagrave, Pitchil, Erridge, Bore, "and Readwood, all lying in Cleave were Parcel; and the ſame Year did "demiſe unto Robert Butler and Julian his Wife, and Robert their Son, now "Defendant, the ſaid Houſe and all the Lands, and Blagrave and Pitchill "Wood, for their Lives (excepting all Timber Trees.) And then, the ſame "Year by Indenture, did bargain and ſell to Edward George, Omnia illa, "boſcos, ſubboscos, maeremium & arbores ſua tunc ſtant. creſcen. & exiſten. in & "ſuper toto illo Manerio ſuo de Cleave, in dicto Com. Somerſet, viz. in & ſuper "tota illa Copicia ſua, ſive boſco vocato le Erridge Wood, cont. 24. Acr. Et in & ſuper

" ſuper toto illo boſco vocat Boorwood cont' 10 Acr'. Ac in & ſuper toto illo " boſco ſuo vocat' Blagrave Wood, cont' 6 Acr'. Et etiam in & ſuper toto illo alio " boſco ſuo vocat' Pitchill Wood, cont' 7 Acr', una cum omnibus aliis boſcis, & ſub- " boſcis, maeremio, & Arboribus ſtant' & exiſten' ſuper præd' & Manerio de Cleave " quæ convenienter parcari poterint & ſuccidi ſine præjudicio & damno ad Statum & " manuten'. Anglice, the State and Maintenance, dicti Manerii de Cleave. And " a Covenant of the Part of the Earl, that the ſaid George, and his Aſſigns, " during five Years, may fell and carry the Woods without Interuption of " the Earl, or any others; and to make ſawing Pits, and to ſquare and " cut the Timber upon the Ground during the ſaid Term, and a Covenant " on the Part of the Leſſee, that he ſhould fill up the Pits, and make all " Things fair, and amend the Fences that ſhould be broken during the ſaid " Term of five Years. Then George, Ann. 38. did bargain and ſell all the " Woods to Prowſe; and Prowſe the ſame Year did bargain and ſell to Ro- " bert Butler, the Father, all the Woods in Blagrave and Pitchill-Wood, and " in the ſeven Hundred Acres; ſo the Woods in the Hundred Acres, going " with the Houſe, and in the other three Woods, remain ſtill with Prowſe, " who after, Anno 40 Eliz. did bargain and ſell unto the Earl of Suſſex all " the Woods by him ſold unto George, except thoſe he had ſold, as aforeſaid, " to Butler the Father. Then Butler the Father, by his Will, did give unto " Butler his Son, the Defendant, his Woods. And the Earl 30 Jac. did " bargain and ſell by Deed inrolled, unto Sir Thomas Stukeley, the Reverſion " of the ſaid Lands, and all his Woods, for 2420 l. to which Butler the Fa- " ther attorned; and then he and his Wife died, and Robert Butler the Son, " and Lewis the other Defendant, as his Servant, by Conſent of Trevilian, " and others the Executors of his Father, felled certain of the Trees in the " Declaration, which was Timber at the Time of the Grant in Blagrave- " wood and Pitchill-wood, and other of the Trees in the ſeven Hundred Acres, And the Jury aſſeſſed Damage ſeverally for the Trees ſeverally felled in ei- ther Wood, and for thoſe in the ſeven Hundred Acres, which was well and adviſedly done.

Upon this whole Cauſe I am of Opinion, that the Defendant had good Title to all the Trees felled, as well thoſe in the ſeven Hundred Acres, as in the two Groves; and that therefore the Plaintiff is to be wholly barred.

I make but two Queſtions; the firſt, whether the Viz. hath Power to re- ſtrain the general Grant of all the Woods upon the whole Manor, to the Woods only growing upon the five Groves; or that the ſame general Clauſe being certain and expreſs ſhall make void the Viz. And I am of Opinion, that the Viz. as the whole Sentence is, is utterly void. The firſt Point, or Queſtion.

The ſecond Queſtion is, whether the Covenant on the Part of my Lord of Suſſex with George, to take the Trees, &c. within the five Years next after the Grant, ſhall ſo check and control the Grant, that he may not take the Trees after the five Years: And I am of Opinion clearly, that it doth not con- trol the Grant, but that as the Trees are abſolutely given, ſo the Bargai- nees and their Aſſigns may take them when they will. The ſecond Point, or Queſtion.

Thirdly, I will give you my Opinion concerning that Part of the Clauſe that runneth under the una cum omnibus aliis, &c. upon which I hold, that that Part of the Clauſe giveth nothing, becauſe it is void for Uncertainty, and yet it hurteth not the former Clauſe becauſe it is diſtinct, and ſtandeth of it ſelf, divided in his Power and Operation from the other.

As to the firſt Point, whether the Viz. doth reſtrain the general Grant of all the Woods, upon all the Manor, to the Woods upon the Copies only. The firſt Point, or Queſtion.

I am of Opinion clearly, that it doth not; and therefore I will conſider firſt in general, how the Premiſes of a Grant may be checked, reſtrained, corrected or explained. The Force and Uſe of a *Viz.*

It may be corrected or reſtrained by a divided Clauſe, or by a Connexion of one Clauſe.

By a divided Clauſe, either in the Thing given by an Exception, or in the State given by an Habendum: But both muſt be where the Premiſes of

Co. L, 47. a. the Grant are not ſpecial and expreſſed, but general and implied, as to the Purpoſe reſtrained.

And therefore though the Law ſay, that when a Man grants Lands, he grants the Underwoods inclufively, and ſo when he grants his Houſe, he grants all the ſeveral Rooms in the Houſe, yet M. 33 and 34 Eliz. in the King's Bench, between Keniſham and Redding, the Caſe was, that the Queen leaſed the Parſonage of Greenwich, with all the Lands and Underwoods expreſly thereunto belonging, (exceptis omnibus groſſis Arboribus, boſcis, & maeremiis.) The Opinion of the Court was, that the Exception as to the Under-woods was void. But they held, that the Exception was only to be extended to great Woods. So is the Caſe, 9 Eliz. 265. of a Leaſe of an Houſe and Shops (excepting the Shops) which proves that the Rule, expreſſio eorum quæ tacite inſunt nihil operatur, it is to be underſtood having reſpect to it ſelf only, and not having relation to other Clauſes.

1 Leo. 247. 3 Cro. 244. 2 Roll. 454.

2 Ro. 454

Cr. Jac. 460. Mo. 881. 1 Leo. 3. 3 Cro. 26. 1 And. 123. So a Leſſee may be reſtrained by a Condition, not to alien, 21 H. 6. 33. but not if the Leaſe be to him and his Aſſigns, as an Office of Truſt to one, and his Aſſigns gives Power to grant it over. Dyer 6. 45. 3 Leo. 67. Latch. 20.

A Condition annexed to an Eſtate given is a divided Clauſe from the Grant, and therefore cannot fruſtrate the Grant precedent, neither in any thing expreſſed, nor in any thing implied, which is of his Nature incident, and inſeperable from the Thing granted.

Dy. 264. b. And therefore Sir Anthony Mildmaye's Caſe, Co. lib. 6. 40. a Gift in Tail, upon Condition not to ſuffer a common Recovery, it leaves you the Land and the Eſtate; but it takes away a Liberty which is inſeperable from the Eſtate, as to a Fee, not to alien. And a Grant of an Houſe, upon Condition not to meddle with the Shops, is void; for this doth not, as an Exception reſerve the Shops to the Leſſor, and from the Leſſee; but leaves them in the Leſſee, and then forbids the Uſe of that it hath made his, which is repugnant.

5 Co. 11. b. So upon Whiſtler's Caſe, Co. lib. 10. 63. though it be well ſaid, that when the King grants a Manor, cum pertinentiis, it no more paſſeth the Advowſon, than if it were expreſly excepted; yet the Words adeo plene, &c. will carry it in the one Caſe, not in the other, when it is excepted. So è converſo, the Manor adeo plene will admit an Exception of the Advowſon, not if it were expreſly granted.

Dy. 97. p. 45, 288. p. 54. Co. L. 47. a. 3 Cr. 792. Ant. 108. Mo. 870. Finch. 53. Upon the ſame Reaſon is it, that if you demiſe a Manor, you may by an Exception pare away as much of the Demeſnes, or Services, or both, as you will; but you muſt leave it ſtill a Manor, having ſome Demeſnes, ſome Services, and a Court. This I mean, when that that you have is ſuch a true Manor, as hath both Demeſnes and Service; for though a Manor may ſtand and paſs by that Name, that is but titular; yet your Grant ſhall be taken, as the Thing is that you Grant.

1 Cr. 130. Ante. 72. 3 Cro. 244. 2 Ro. 454. Again, by an Exception, you ſhall not make the whole Grant fruſtrate, though the Grant be in general Words. And therefore, if you you have but one Cloſe in D. and you demiſe all your Land in D. (excepting that one Cloſe) the Exception is void.

3 Cro. 6. 18 Eliz. in the King's Bench, Dorrel brought an Ejectment againſt Collins, in Lamberhurſt in the County of Kent. The Jury found, that the Maſters and Scholars of Linkford were ſeiſed of the Land in Queſtion, being Part of the Manor of Hothley in Lamberhurſt, and that they did demiſe all their Lands in Lamberhurſt, excepting the Manor of Hothley, under which the Plaintiff claimed; and they found, that Lamberhurſt did extend to Kent and Suſſex, and that the Maſter, &c. had no Land in Lamberhurſt but the Manor of Hothley; and it was adjudged, that the Leaſe did carry the Manor of Hothley, and that the Exception was void: And alſo, that the Jury being only of Kent ought to find, that they had no Lands in Suſſex, as well as in Kent, becauſe the Iſſue, Guilty or not Guilty, depended upon it; otherwiſe, where a local Thing in another County is ſpecially put in Iſſue.

Co. L. 47. a.

6 Co. 47. a. Like Law is of the Uſe of an Habendum, that if by your Premiſes you have given no certain nor expreſs State, than that otherwiſe the Law would give;

give, you may alter and abridge, nay you may utterly fruſtrate it by the Habendum. And therefore in the Caſe of Hodge and Croſſe, M. 33 and 34 Eliz in the King's Bench, one Warren made a Feoffment of Lands in London, Habendum to the Feoffee and his Heirs, after the Death of the Feoffor; and upon Argument the Feoffment was ruled to be void. Cr. El. 254. Ro. 2. Ab. 66. 10. Palm. 30. Mo. 423. 2 R. 55. t. 5 R. 94. t. Co. L. 48. t. Plo. 156. a.

And yet in the Caſe of Underhay and Underhay, Hill. 34 Eliz. in the King's Bench, the Caſe was: That one having leaſed his Land to three for their Lives, granted the Reverſion Habendum to the Grantee for his Life, and then added theſe Words, which ſaid Eſtate for Life to begin after the Death of the three firſt Leſſees. And that was adjudged a good Eſtate in Reverſion for Life. 3 Cro. 261, 269. 2 Ro. 66. Jones, 349. 1 Cr. 367. Bacon's Elem. 55. Grants, B. 60. Plo. 520. 156. a. 250. b. 1 Cr. 155. Dy. 272.

Neither can you by an Habendum fruſtrate a Grant that was compleat before, as the Caſe is 7 Ed. 6. where a Leſſee for Years granted all his Eſtate Habendum after his Death. So much of divided Clauſes. 3 Cro. 255, 585. 2 Co. 23. b. 1 Co. 155. a

But now of one Clauſe carried on with a Connexion, ſo as they make but one entire Sentence, 'till the Whole be finiſhed, the Law is otherwiſe; for one Part of the Sentence may not only abridge and correct, but utterly fruſtrate and make void the whole Grant. And therefore if a Leſſee for Years grant his Term after his Death, the Grant is void. 1 Cr. 130, 473, 548. Cr. Jac. 459. 3 Cr. 300. 2 Cr. 48.

So in Doughty's Caſe, Co. lib. 3. 9. the Caſe was, that the Duke of Northumberland was ſeiſed of divers Houſes and Cottages in the Pariſh of Saint Sepulchres London, and bargained and ſold all his Tenements in the Pariſh of Saint Andrew's Holbourn, in the Tenure of one William Gardiner, unto one Lea; and the Grant was judged void, though thoſe Houſes were in the Tenure of Gardiner, which was the Point judged. But where it is added in that Caſe, that the Court was of Opinion, that if he had begun with the Tenure of Gardiner, which was true, and ended with the Pariſh miſtaken, that the Grant had been good by the Rule, utile per inutile non vitiatur; I hold it plain contrary, for the ſeveral Circumſtances and Deſcriptions circumſcribe and aſcertain the Grant. And it is a good Rule, Incivile eſt niſi tota ſententia perſpecta de aliqua parte judicare. Bacon, 90

And therefore the Judgment in Doddington's Caſe, Co. lib. 2. 32, 33. is full in the Point. H. 8. was ſeiſed of the Hoſpital of Welles, whereof certain Lands in Dindace, out of the Circuit of Welles, which were in the Tenure of John Browne, were Part, and he granted unto Ailworth all his Lands, in the Tenure of John Browne ſituate in Welles to the ſaid Hoſpital belonging. And it was adjudged, that though the firſt Part of the Deſcription as it was placed in the Patent, in the Tenure of Browne, were true, yet the latter Part (being Falſe) marred all, even if it were the Grant of a Common Perſon. And indeed in one Sentence it is vain to imagine one Part before another, for though Words can neither be ſpoken nor written at once, yet the Mind of the Author comprehends them at once, which gives vitam & modum to the Sentence. 1 Leo. 21. 3 Cro. 255.

But in Grants of Particulars ſufficiently once aſcertained, another miſtaking will not fruſtrate, though it be Falſe. As Paſ. 23 El. Dyer 376. One made a Feoffment by Attorney of a Meſſuage in D. which was R. Cotton's, and indeed it was Th. Cotton's, yet it paſſed; for elſe all was to be fruſtrate; but a Thing certain may be diminiſhed, though not wholly made void, as in Ognell's Caſe, C. lib. 4. Rainsford poſſeſſed of a Term in Cruel Grange, whereof Part, that is to ſay Hobsfield, came to one Freckelton in Poſſeſſion for Part of the Term, and to one Beer for the reſt of the Term in Reverſion; and a Rent-charge was granted out of Cruel Grange, nuper in Tenura Rainsford, & modo in Tenura & ocaupatione Beer; this did not charge Hobsfield, but it charged the reſt, and ſo there was no Repugnancy. 1 Leo. 473. Plo. 191. b. 10 Co. 113. a. Dy. 292. Bac. 91. 4 Co. 48. b. 50. a. Dy. 87. a

Now I come to the Uſe of a (viz.) or (ſc.) or in Engliſh (that is to ſay) and the Nature and Force of it. It is neither a direct ſeveral Clauſe, nor a direct entire Clauſe, but it is intermedia.

Firſt it is clear, that it is not a Subſtantive Clauſe of it ſelf, and therefore you can neither begin a Sentence with it, nor make a Sentence of it by

it ſelf; but it is (as I may ſay) clauſula ancillaris, a kind of Hand maid to another Clauſe, and to deliver her Mind, not her own. And therefore it is a kind of Interpreter; her natural and proper Uſe is to particulariſe that that is before General, or diſtribute that that is in Groſs, or to explain that that is Doubtful and Obſcure.

1 Saund. 286. Yelv. 94. 2 Cro. 96, 154, 428, 429. 3 Cro. 368.

First, it muſt not be contrary to the Premiſes, as 20 H. 6 Treſpaſs with a Continuando, 'till the Day of the Writ purchaſed, ſc. ſuch a Day, which is not the ſame, is utterly void. 1 Saund. 118, 169. Yelv. 93, 94. 1 Syd. 370.

Next it muſt neither increaſe nor diminiſh, for it is not the Nature of it, to give of it ſelf: As if I have in D. Black Acre, White-Acre, and Green-Acre; and I grant unto you all my Lands in D. that is to ſay, Black-Acre and White-Acre, yet Green-Acre ſhall paſs too; but if I add under the viz Land lying out of the Town of D. it ſhall not paſs. And therefore ſee 29 Aſſize 22. upon a Partition between three partners in Chancery; one of them for a Surpluſage, granted unto the other two, a Rent of five Pounds a Year; that is to ſay, to the one Fifty Shillings, and to the other as much; yet it was judged an entire Rent. And 29 E. 3. 39. it is holden, that if I grant a Rent of 20 s. out of two Manors, ſc. 10 s. out of one, and as much out of another, it is but one Rent. So are Knight's Caſe, Co. lib. 5. 55. and Winter's Caſe, 14 Eliz. Dyer 308. upon a Difference where the Rents are reſerved ſeverally at the firſt, and where they are at the firſt entire, and taken by a viz.

Cr. Car. 154. Cr. Jac. 341.

So 18 El. Dyer 350. an Obligation of two Hundred Pounds to two ſolvend. the one Hundred to the one, and the other to the other, the Book leaves a quære; but it is clear, a void ſolvendum. So Hill and Grange's Caſe. A Leaſe made in April for Example, rendring a Yearly Rent (that is to ſay) at our Lady-day, and Michaelmas, the yearly Payment cannot be diminiſhed. Osborn's Caſe. Co. lib. 10. 13. An Anglice (which is but a viz. or that is to ſay) ſhall never exceed the Latin.

Mo. 64 Yel. 177. Co. L. 217. b.

1 Saund. 170.

But now I grant on the other Side, that a viz. may work a Reſtriction where the former Words were not expreſs and ſpecial, but ſo indifferent, as they may receive ſuch a Reſtriction without apparent Injury; though thoſe former Words by Conſtruction of Law would have had a larger Senſe, if the viz. had not been; and therefore ſee 7 E. 3. 9. Mortimer's Caſe: One granted Ten Pounds of Rent (Note, not a Rent which muſt (as I have ſaid) be underſtood one Rent of Ten Pounds) in his Manor of D. to receive by the Hands of one Tenant ſo much, and ſo from one Tenant to another, 'till he made up Ten Pounds, ſaving his Signiory. And the Opinion of the Court was, that this was but a Grant of the ſeveral Rents of thoſe Tenants, as Rent ſec. by this viz. which had been otherwiſe, if it had left at the Premiſes without the viz. for then it would have been a new entire Rent of Ten Pounds out of the whole Demeſns of the Manor. But I am of clear Opinion, that if the particular Rents in the firſt Caſe had made but five Pounds, that then the Premiſes would have taken Place, and the viz. had been void. Like unto the Caſe of 15 Aſſ. 11. and 15 Ed. 3. Fitz. Charge 9. If A. grants Twenty Shillings Rent in his Manor, viz. by the Hands of one ſo much, and of another ſo much; and the Tenants aſſigned are but Tenants at Will, the whole Manor is charged, for the (viz.) being of no Effect, is void in Law: For it ſelf being of no Effect, cannot fruſtrate the Premiſes, which are of Sufficiency of themſelves, 8 Ed. 3. 59. One gave Land to A. and B. Habendum to A. for Life, and after his Deceaſe to B. this was holden good. So Littleton 66. if a Man give Land to two Habendum to them, ſc. the one Moiety to the one, and the other Moiety to the other, it is good. For note, that the Subſtance of the Premiſes is not altered, for both of them have the whole in Uſe, in Common as they ſhould have had it by the Premiſes jointly, which is but a Point of Quality, or Accident altered. But if it were Twenty Acres to two, ſc. Ten to one, and Ten to another, it were void. So upon the Caſes 21 H. 6. 7. and 13 H. 7. 24. I hold, if I grant Land to one, and his Heirs, viz. the Heirs of his Body, it is an Eſtate Tail. So 13 Eliz. Dyer 299. in a Quare Impedit, one is pleaded ſeiſed of a Manor, to which the Advowſon appends, viz. to preſent in the third Turn, it is good, but if one ſeiſed of a whole Advowſon

2 Cr. 97. Dy. 10. b. 361. a. Poſt. 313. 8 Co. 93. b. Ro. 2. 65. Mo. 26. 3 Cr. 38. 1 Leo. 10. bon' Caſe. Dy. 126. b. 160. b. Palm. 34. 1 Inſt. 183. b. Mo. 44.

Finch. 58. utra.

Co, L. 21. a.

vowſon ſhould grant the whole, viz. to preſent every third Turn, the viz. were void. So upon the Caſe 9 Eliz. Dyer 261. if a Man have Lands in a Hamlet, and other Lands in another part of the Town; if he grant his Lands in that Town, ſc. in the Hamlet, I hold that no more will Paſs. But if he grant all his Lands in the whole Town, viz. in the Hamlet, all the Land will Paſs, and the viz. is Void: And 6 Edw 6. Dyer 77. the King granted ſitum Abbatiæ nec non omnia terr. prat. paſtur. & ſubſcript dict. Monaſterio pertinen. viz. ſuch a Cloſe, and ſuch a Cloſe; and the Opinion is, that the viz. ſhall only ſerve to explain the Word Subſcript. and that all other the Lands belonging to the Monaſtery, ſhall paſs by the expreſs Words. Cr. Jac. 110. 1 Leo. 120. bon' Caſe. Cr. Car. 21.

Now to the ſecond great Point, which is, whether the Covenant on the part of the Grantor, for the five Years, do diſable the Grantee, or thoſe that claim under him, to take the Trees after the five Years expired. The ſecond great Point. Mo. 23, 882.

I will ſay little, for I declared my ſelf in the Beginning not to hold that queſtionable, neither do I yet.

For firſt it is clear, that by the Grant of the Trees by a Tenant in Fee-ſimple, they are abſolutely paſſed away from the Grantor, and his Heirs, and veſted in the Grantee, and go to the Executors or Adminiſtrators, being in Underſtanding of Law, divided as Chattels from the Free-hold: And the Grantee hath Power incident and implied to the Grant to fell them when he will, without any other ſpecial Licenſe, which can never be reſtrained by a Power given by the Grantor in the Affirmative, which the Grantee had before. 4 Co. 80. b.

And therefore 8 Aſſ. 10. one granted a Rent of Ten Pounds a Year to the Husband and the Wife for their Lives; and if the Wife ſurvive, that then ſhe ſhall have three Pounds a Year for her Life, and judged ſhe ſhould hold her Ten Pounds a Year: Otherwiſe if it had been ſaid, that ſhe ſhould have three Pounds a Year, and no more. And ſo Trin. 28 H. 8. Dyer 19. the Leſſor covenanted, that the Leſſee might take Thorn by Aſſignment of the Bailiff, yet he may take without; otherwiſe if it were in the Negative. Mo. 7.

Statutes that are taken by Intent, ſhall not by an Affirmative alter a former Power, 33 H. 8. Dyer 50. The Stat. 27 H. 8. 17 Eliz. Dyer 341. hereafter. 2 Cro. 481.

Now the Grant implying an abſolute Liberty to the Grantee to take, if the Covenant were on the Part of the Leſſee, not to take after the five Years, it would not extinguiſh his Property, nor conſequently his Power, to take them after the five Years; and therefore if he took them he might plead not Guilty in Treſpaſs, but ſhould be anſwerable to an Action of Covenant for it; for things have their proper Effects and Conſiderations, and ſeveral reſpects of Actions are not to be confounded. And therefore 3 Eliz. Dyer 199. if the Leſſor covenant to repair the Houſe at his proper Coſts; or again, if the Leſſee covenant to repair the Houſe at his proper Coſts in Timber-work, and the like, yet in both Caſes, if he felled Timber to repair, there is no Change in the Remedy by Action of Waſte, but by Action of Covenant. 8 Co. 82. a.

The Statute of 27 H. 8. of Court of Augmentation, all Grants of Lands, within their Survey ſhall be ſealed with that Seal, yet ſee 33 H. 8. Dyer 50. for want of a Negative, much more if it had been (may be ſealed) as here, 17 Eliz. Dyer 341. the late Monaſteries were given to the King; Proviſo, to avoid fraudulent Leaſes within the Year of the Diſſolution, and another Proviſo in the Affirmative, that Leaſes with the ancient Rent ſhall be good: Yet judged that a Leaſe within Forty Days without ancient Rent was good, for they had lawful Power before, and there is no Negative.

Laſtly, this Covenant on the Part of the Grantor hath its neceſſary Uſe, though it work nothing in the Reſtraint of Time for felling, for it gives Power to dig, and make Saw-pits upon the Ground, and to ſquare the Timber there, which the Grantee could not do by the ſimple Grant of the Timber, without ſuch a ſpecial Warrant. Alſo it contains a general Warranty, that the Grantee may take and fell Timber without the Let or Interruption of any Perſon or Perſons whatſoever.

The Clauſe *una cum omnibus aliis.*

Now to the third and laſt Point, if the Clauſe had been that the Earl had granted all his Woods and Under-woods growing upon all his Manor of Cleave which could conveniently have been ſpared without Prejudice to the Eſtate of his Manor, I ſhould be of Mind that this Grant were void.

2 Ro. 55.

And yet it is true, that many Things that are uncertain of themſelves, being reduced to Certainty by ſuch Means as either the Law appoints, or the Party himſelf aſſigns, may take Effect; and therefore the Caſes put are clear, that the Fine of a Copyholder being uncertain, ſhall be made certain and Reaſonable by the Jury and the Court, upon the Circumſtances of the Caſe. So of convenient time of Remove upon the Death of a Tenant for Life, 41 E. 3. barr. 205. in Treſpaſs for eating his Corn; the Defendant pleaded that he had Common, and the other left his Corn there, after other Men had carried, and it was ready to be carried, &c. of evil Will, &c. the Plaintiff, that it was not dry, &c. But note, that all theſe, and the like, are Proviſions in Law, for Acts in Law. Alſo I grant, that if the Earl had covenanted or granted, that Gorge might have taken ſuch Trees as might conveniently have been ſpared without Prejudice, &c. that this being but a Covenant, or grant Executory, he might have taken Trees by force of it, and have juſtified, ſpecially averring that they might be ſpared, and put himſelf upon the Jury for it. But our Caſe is not of that Nature; but it is a Grant or Bargain which muſt take Effect, and change the Property of the Thing granted, either preſently and at once, or inchoative depending upon ſomewhat that ſhall reduce it to his full Effect; which when it is done ſhall make the Grant good ab initio.

20 H. 7. Caſe Strat. Mare. Co. L. 45. b.

And if I make a Leaſe to A. for ſo many Years as I. S. ſhall name, or grant ſuch Liberties as another Town hath, both theſe, at the Time of the Grant, appear in Caſe to be made certain, and the common Caſes of Grants, that take the Perfection by Elections given by the Party, or by the Law to certain Perſons.

The ſame Books and Reaſons that prove, that when the Election creates the Intereſt, nothing paſſes 'till Election, the ſame prove that where no Election can be, no Intereſt can ariſe.

1 Le. 254. Apr. 222.

Bullock's Caſe, 10 Eliz. Dyer 281. Feoffment of an Houſe and 17 Acres, Parcel of a Waſte, the Feoffee, not his Heirs, muſt make his Election, or elſe the Grant is void, and 2 H. 7. 23. So Hayward's Caſe, Co. lib. 2. 36. if I give the one of my Houſes, nothing paſſes 'till the Donee chooſe, therefore he muſt do it, his Executors cannot, 44 E. 3. 43. is a good Caſe. A Prior ſold his Woods, excepting Forty of the beſt Oaks at his Choice, to be taken within two Years; then the Prior brought an Action of Treſpaſs againſt the Vendee for felling them: He pleadeth, that the Plaintiff delaying his Choice 'till the two Years were almoſt expired, that he could forbear the felling no longer, but his two Years would expire, and therefore required him to make his Choice; but he refuſed, whereupon he choſe Forty of the beſt himſelf, and left them ſtanding, and took the Reſt.

Co. 25. a.

So note, that the Vendee in this Caſe had no Property, 'till Election or Default made by the Vendor, which was ſupplied and made certain by the Vendee; and yet the Vendee could not have made the Choice in Default of the Vendor, 'till the Time incurred ſo near, that he muſt needs, and that muſt be put upon Judgment of the Jury or Court, upon ſpecial Declaration of the Time, and Number of the Trees, and the like. But here it cannot change Property preſently of any Trees certain, becauſe it is uncertain which Trees may be ſpared, and which not; and divers Trees may be ſpared, and indifferent, whether theſe or thoſe, and there is no Perſon to whom it is given to determine which may be ſpared, which not: But if the Grant had been of ſuch Trees as I. S. ſhould judge might be ſpared, it might have ſtood with his Determination. Primo Mariæ, Dyer 90. a Sale of Woods which may be reaſonably ſpared 7 E. 6. Term that ſhall be to come after his Death, uncertain and apparent, that at the Time of the Grant it is not referred to Certainty, 22 H. 6. a Grant to two, & hæred. Void.

2 And. 142. Mo. 882. Dy. 91. a. 1 Ro. 55.

2 Cr. 262.

But

But the Defendant hath pleaded not guilty, which he cannot Maintain, unleſs the Trees were actually his before he felled them; for it had been but a Liberty to fell, he muſt have pleaded it, and not pleaded not Guilty. Alſo he muſt have averred, that they might have been ſpared, which is not pleaded nor found by the Jury. And ſo the Defendant pleaded, Primo Mariæ, Dyer 90.

Now though I am of Opinion as before, that this laſt Clauſe is void for Incertainty; yet I hold clearly, that it reaches not to the firſt Clauſe of Grant, upon which I have argued and concluded for the Defendant; but looks back only to the laſt Clauſe, beginning at una cum omnibus aliis boſcis, &c. which though it be fruſtrate, yet the firſt Clauſe ſtands perfect of it ſelf; for it is true, that if a Grant be carried in generals, which of it ſelf is not certain, if that by the other Parts of the ſame entire Sentence in point of Deſcription, or other Declaration cannot be true, as in Doughtey's and Darrington's Caſes before, or cannot be effectual, as in this Concluſion of Uncertainty, or be reſtrained by a Concluſion, as in Finch's Caſe, Coke lib. 6. 39. mark the Sentence.

The Rent of Twenty Pounds a Year was granted by the Lady Finch to her Son, in theſe Words, Out of the Manor of Eaſtwell, Otterplea, Potbury, and Seaton, and her Lands lying in the Pariſhes of Eaſtwell, Weſtwell, and Challock, or elſewhere in the County of Kent, to the ſaid Manor, or any of them belonging; clearly this charged no other Lands in thoſe Towns, but ſuch as belong to the Manors; for it is plainly one only entire compacted Sentence, ſo woven and interlaced together, as there is neither Diviſion in Words nor Senſe, and that is a Joining of the Sentence to good Uſe, and not to avoid all. Dy. 207. p. 14. Godb. 16. p. 23. Goldsb. 99. p. 3.

Note, theſe Caſes are of one entire and compacted Sentence, and therefore one Part may overthrow or reſtrain another: But our Caſe hath two Clauſes that are clearly diſtinct.

Firſt, a Grant of all thoſe his Woods ſtanding upon his whole Manor, which anſwers the Pronoun illa, being reſolved thus; all thoſe Woods which ſtand, to that Clauſe, I join the Viz. as an Hand-maid, as I ſaid, though it be void.

Then comes the ſecond Clauſe, una cum omnibus aliis boſcis, &c. which in Law, though it be governed by the firſt Words of Grant, yet that Word of Grant is reſpectively as ſeveral Grants of ſeveral Things. And it is all one as if he had ſaid, he granted all the Woods growing upon his whole Manor, and he alſo granted all other his Woods that might be conveniently ſpared, &c. And in that Caſe of Finch it is granted, that if I grant a Rent in this Form, iſſuing out of my Manor of D. and out of my Lands and Tenements in D. and S. and out of my Lands elſewhere to the ſaid Manor belonging; that this middle Clauſe ſtands ſo in frame divided, that it ſhall charge my Lands in thoſe Towns, though they be no Part of the Manor; and yet that Clauſe is incloſed with the Manor, both before and after; much more here, where the firſt general Clauſe ſtands clear by it ſelf, and the ſecond Clauſe, under the una cum omnibus aliis, is a new Addition, and of other Things than were before granted, and hath his own Concluſion, with convenienter, &c. attending upon it. Ye'v. 82. 1 Cr. 47. 6 Co. 39. b.

(196) Edward Topſall, and others *verſus* Ferrers.

Trin. 15 Jac. Rotul.

EDward Topſall Clerk, Parſon of Saint Botolphs without Alderſgate, and the Churchwardens of the ſame, libelled in the Court Chriſtian, againſt Sir John Ferrers Knight; and alledged, that there was a Cuſtom within the City of London, and eſpecially within that Pariſh, that if any Perſon die within that Pariſh, being Man or Woman, and be carried out of the ſame Pariſh, and buried elſewhere, that there ought to be paid to the Parſon of this Pariſh, if he be buried elſewhere, in the Chancel ſo much, and to the Churchwardens ſo much, being the Sums that they alledged, were by Cuſtom payable unto them, for ſuch as were buried in their own Chancel; and then alledging, that the Wife of Sir John Ferrers died within the Pariſh, and Libell. Ecc. Winch. Ent. 588. 1 Ro. 559. Cuſtom of the Pariſh, that a Paſſenger dying there, ſhould pay Fees there, though buried elſewhere. Mod. R. 48.

and was carried away and buried in the Chancel of another Church, and ſo demand of him the ſaid Sum. Whereupon, for Sir John Ferrers a Prohibition was prayed by Serjeant Harris, and upon Debate it was granted; for this Cuſtom is againſt Reaſon, that he that is no Pariſhioner, but may paſs through the Pariſh, or lie in an Inn for a Night, ſhould be forced to be buried there, or to pay as if he were; and ſo upon the Matter to pay twice for his Burial.

(197) Plant *verſus* Thorley.

Treſpaſs.

Hill. 14 Jac. Rot. 861.

Staff. 1 Brnl. 200. 3 Cr. 371. Treſpaſs, Br. 366. 2 Cr. 141.

Stat. of Jeoffails, Verdict helped thereby.

"PLant brought a Treſpaſs againſt Thorley, for taking and carrying a-
" way an Hundred Loads of Turfe at Leake; the Defendant pleads,
" quod locus in quo (whereas there was no Place aſſigned) was two Acres,
" called Black-acre in Leake, which was his Freehold, and that he digged the
" Turfe there, and took them away prout, &c. The Plaintiff ſays, that lo-
" cus, in quo, was a Piece which contained Twenty Acres in Leake, alia quam,
" &c. and the Defendant quod aliquam tranſgreſſ' in præd. 20 Acris, not Guil-
" ty. Whereupon Iſſue was taken and found for the Plaintiff." And it was moved in Arreſt of Judgment, that this was no Iſſue; for there was no Twenty Acres, nor Place certain in the Declaration; yet the Court gave Judgment for the Plaintiff. For though it were not in the Declaration, yet it was no plain Departure from the Declaration; for both Parties were agreed, that the Treſpaſs was done at Leake; ſo that the Aſſigning of a more particular Place in Leake ſtands well with the Declaration, and doth but reduce it to more Certainty, and is a Supply of that, that might have been well laid in the Declaration. And ſo it is not a Verdict out of the Matter, and ſo no Iſſue, but it is a Verdict holpen by the Statute of Jeoffails.

(198) Shaw *verſus* Tayler.

Hariot. Vid. Hutton's Reports, 4. the ſame Caſe. Dy. 200, a. Cr. Car. 260. Hariot Service.

Mich. 14 Jac. Rot. 2387. or 3287.

Nulla habuit animalia.

The Defendant made Avowry for Hariot-ſervice; the Plaintiff pleaded in Bar, that the Tenant at the Time of his Death nulla habuit animalia; and the Defendant demurred: And it was adjudged for the Plaintiff, becauſe the Avowry was inſufficient; for that it did not ſet down in certain, what the Hariot ſhould be, ſcil. Beaſt, or other Thing. Quære, if it were expreſs the beſt Beaſt, either in Caſe of Tenure or Cuſtom, if the Tenant have none without Fraud.

Note, no ſuch Thing in rerum natura, no Guard, if their be no Heir, or he of full Age.

(199) Hawles *and* Bayfield.

Prohibition.

Hill. 13 Jac. Rot. 312. B. R.

2 Cro. 137, 669. Yelv. 94, 95. 2 Roll. 63, 174. 2 Le. 73. Palm. 377. Owen 103. Latch. 176. Hetl. 128. Noy. 21, 22, 28. 1 Ro. 63. 1 Le. 23. 1 Ro. 174. Cr. Ell. 188, 249. Agreement Verbal to pay Money in diſcharge of Tithes void.

It was reported in the Common Pleas this Term, Trinit. 15 Jac. That in the King's Bench, in the Term and Roll aforeſaid, between Hawles and Bayfield, a Prohibition was awarded upon this Surmiſe, that between the Lord Chandois then ſeiſed in the Mannor of Blunſden in Wiltſhire, and the Defendant, then Parſon of Blunſden; there was a Concord and Agreement, that the Lord Chandois and his Farmers of his ſaid Mannor, ſhould pay unto the ſaid Parſon, ſo long as he ſhould remain Parſon, ſuch a Sum of Money in full ſatisfaction of all Tithes; and that in Conſideration thereof they ſhould hold the ſaid Mannor diſcharged, &c. And upon Demurrer it was adjudged for the Defendant, and a Conſultation awarded.

Steward

(200) Steward *verſus* Biſhop. Caſe.

Trin. 14 Jac. Rot. 769.

JAmes Steward brought an Action of the Caſe againſt Biſhop, for ſaying of him, James Steward innuendo, &c. is in Warwick Goal, for ſtealing of a Mare, and other Beaſts; and after a Verdict for the Plaintiff, upon divers Motions in Arreſt of Judgment, the whole Court gave Opinion ſeriatim, that the Words would not bear Action; for they do not affirm directly, that he did ſteal the Beaſts, as if he had ſaid, that he ſtole them, and was in Goal for it; but they do only make Report of his Impriſonment, and the ſuppoſed Reaſon of it, and it may very well be, that the Warrant or Mittimus was for ſtealing expreſly, and it is the Common Form of making of the Kalendars of the Priſoners for the Juſtices of Aſſize, or the like.

Action for Words, he is in Goal for Stealing. 1 Ro. 64. Brownl. R. 16. Noy. 24. Hutt. 2. meſme caſe. Roll. 49. Mo. 866. Mo. 401. Goldb. 130. 1 Cr. 268. 3 Cr. 234. 2 Cro. 247. utra. 536. 154. ſemble utra. 3 Cro. 238, 279. 1 Cro. 263, 268, 269. Poſt. 219.

(201) Gage's Caſe.

GAge an Attorney of this Court, ſued as Adminiſtrator by Writ of Privilege, and it was moved by Chibborn, that they ought to ſue by Original; Quod fuit conceſſum; and therefore he took out his Original, Paſc. 15 Jac. And the Defendant appeared, and the like Opinion was given this Trinity Term, e converſo, for Drury, who was ſued as Executor to his Brother, by Bill, being an Attorney.

Savill. 28. Accord. Palm. 233. 1 Brnl. 47.

(202) Bell *againſt* Hartley and his Wife. Waſte.

Tr. 14 Jac. Rot. 1840.

RIchard Bell brought an Action of Waſte againſt Hartley and his Wife; and after Iſſue joined at the Niſi prius, the Parties appeared, and Verdict was given for the Plaintiff; and now at the Day in Bank, Henden Serjeant moved that the Wife might be received; but 'twas rejected as a ſtrange Motion.

Receipt. Br. 122.

(203) Swinnerton *againſt* Miller. Replevin.

Hill. 14 Jac. Rot. 2049.

IN a Replevin between Swinnerton Plaintiff, and Miller Defendant, upon Occaſion of Motion in Arreſt of Judgment, it was reſolved by the Court, that whereas one Robert Winniffe was ſeiſed of a Copyhold of the Manor of Iſlington, and by Licence of the Lord demiſed the ſame by Indenture to the Plaintiff for Twenty Years, rendring Twenty five Pounds per Annum; that the ſaid Robert Winniffe ſurrendred by the Reverſion of the one Moiety of the ſame Copyhold to the Uſe of Nicholas Winniffe, to which he was admitted, and then he ſurrrendred the other Moiety to one Mary the Wife of John Miller, who was alſo admitted, and the Defendant as Bailiff to the ſaid Mary and her Husband, for half the Rent, as belonging to the Reverſion of the half made Coniſance. It was reſolved by the Court, that the Surrender by the Name of Reverſion was good in this Caſe (though the Leaſe were not made by a Surrender (which had been directly derived, and that according to the Cuſtom, out of the cuſtomary Eſtate) but by Indenture, for ſtill it is the Leaſe of the Copyholder, and not of the Lord; and yet perhaps if the Copyholder ſhould forfeit his Eſtate, the Leaſe would ſtand againſt the Lord in this kind of demiſing by Licence. Alſo it was holden clear, that the Rent was to be divided by Halfs, according to the Halfs of the Reverſion.

1 Roll. 235, 294. v. Collins & Cro Eliz. 606, & 622. 1 Brnl. 178. Entre congeable, Br. 139.

Hutt. 102. Pop. 188.

Inſ. 148. t Co. 8. 79. b 3 Cr. 637.

Laſtly, the Court was of Opinion, that there needed no Attornment upon the Surrender made of the Moiety of the Reverſion by Robert Winniffe unto Nicholas, becauſe it paſſeth not by way of Grant of Reverſion and Attornment;

1 Leo. 297. 3 Leo. 197. Co. L. 49. b. 1 Roll. 294.

tornment; but there muſt be an Admittance of the Lord; and when that Admittance is given, the Eſtate is ſettled, and there is no Means in Law to compel the Leſſee to Attorn. And the Admittance is a kind of Act in Law, and puts the State into the Party in a ſort in the Poſt. But I am of Opinion, upon the Reaſon of Mallarie's Caſe, Co. lib. 5. that there ſhall be no Entry for Condition broken in ſuch a Caſe without Attornment. Aut indeed, it is not within the Statute of Conditions. Yelv. 222, 223. 2 Cro. 305.

5 Co. 111, 113. b. 1 Cr. 25, 44.

4 Co. 21. b.

(204) Pickaver's Caſe.

Stat. 23 H. 8. cap. 9. Ant. 17. Poſt. 185, 186.

IN the Caſe of one Pickaver, it was reſolved by the Court, upon the Stat. of 23 H. 8. that if a Biſhoprick within the Province of Canterbury be void, and ſo the Juriſdiction devolved to the Metropolitan, that he muſt hold his Court within the inferior Dioceſs, for ſuch Cauſes, as were by that Law to be holden before the inferior Ordinary. And I moving that as my Opinion, it was ſaid by the Prothonotaries, that it had been ſo formerly reſolved.

Obligation. (205) Andrews *againſt* De-la-hay.

1 Brnl. 68. 11 Co. 56. a. 10 Co. 119. a. 3 Cr. 101. 2 Le. 20. 3 Cr. 69. Pio. 84. 11 Co. 45. b.

SIr William Andrews brought a Bill of Debt, of Ten Pounds, againſt De-la-hay, an Attorney, and counted upon three ſeveral Bonds of five Marks a-piece; and upon the Oyer of the ſeveral Conditions, it appeared, that one of the Sums in the Condition, was payable after the Bill exhibited, and Iſſue was joined upon Conditions performed, and Verdict given for the Plaintiff, and entire Damage and Coſts aſſeſſed; and per Cur' he cannot have Judgment in Form as it is found. Nevertheleſs upon Releaſe of Dammages and Coſts, Judgment was given for the two firſt Bonds only; for though the Bill were an entire Sum; yet by the Count it appeareth, that they were as ſeveral Demands: So the whole Suit is not falſified by the Plaintiff himſelf, for it is as ſeveral Demands and Suits: Tamen Quære, if it had been ſo by Original.

1 Saund. 286.

Debt. (206) Bird *againſt* Culmer.

Ro. 1. Abr. 929. Poſt. 199. 2 Keb. 606. p. 39.

BIrd brought an Action of Debt againſt Culmer an Executor, upon plenie-ment adminiſtre; the Plaintiff replied that he had Aſſets; and the Defendant, relicta verificatione cognovit Actionem, nec quin ipſe detinet; the Debt, &c. And Judgment whas given pro querente de bonis Teſtatoris, which was entered Hill. 12 Rot. 2053. And it was moved by Richardſon, that the Confeſſion ſhould alſo contain, that he had Goods ſufficient, &c. and prayed, that that might be added to the Entry; but the Court refuſed to do ſo; for indeed, the Confeſſion naturally can extend no further than to the Count which is of the Debt, and not of the Aſſets. Yet if the Defendant will Confeſs more he may, and there are Entries both ways. Note, that in this Caſe he had pleaded plene, &c. And the other had replied Aſſets; and then he confeſſes, leaving (which may be taken diſavowing) his Plea of plene adminiſtravit.

Obligation. (207) Earl *and* Tuck.

Condition to make Compoſition for Land. Dy. 1. a

IN Debt upon an Obligation, with Condition, that if the Defendant ſhould make Compoſition with one Earle for Lands, &c. then he ſhould pay the Plaintiff Thirty Pounds: The Defendant pleads, that he made no Compoſition. The Plaintiff replies, that the ſaid Earle did grant unto the Defendant, a Rent Charge of five Marks in Fee, in Satisfaction of his Title, &c. which the Defendant did accept in Satisfaction, &c. and ſo he made Compoſition. The Defendant proteſtando that Earle non conceſſit, &c. pro placito that the Defendant did not accept it in Satisfaction, &c. And

And it was holden a good Plea, for it it is no Compoſition without Conſent, which depends upon the Acceptance, and the Grant is at the moſt but Argumentative.

(208) Flood *verſus* Knight.

RObert Flood informed againſt Richard Knight, for uſing a Trade not being Apprentice. Information, uſing a Trade not having been an Apprentice.

(209) Loveden's Caſe. Debt.

AN Action of Debt was brought againſt Loveden and his Wife, for the Recuſancy of the Wife; and the Husband would have appeared by Superſedeas alone; but the Court was reſolved, that either both muſt appear, or both be outlaw'd. Wife Recuſant muſt appear with her Huſband. Default, Br. 22. Cr. Car. 58. Styl. 475. Dy. 27. Cr. Jac. 445. Baron & Feme, Br. 5.

(210) Coachman *againſt* Halley.

Hill. 14 Jac. Rot. 2167.

DEbt by Coachman againſt Halley, Bailiff of Aſhford, for an Eſcape, and counted upon a Recovery, in the Court of Aſhford. The Defendant pleaded Null tiel Record, and now in the Record certified, there were divers Differences in the Continuances, and in the Proceſs; and yet becauſe the Plaint Count and Judgment certified agree with the Declaration, Judgment was given for the Plaintiff. Record certified. 1 Brnl. 68.

(211) Copley *againſt* Collins. Prohibition.

Mich. 14 Jac. Rot. 3444.

IN Prohibition it was reſolved, that the ſix Months for Proof of the Surmiſe ſhall not be counted by Twenty Eight Days to the Month, but according to the Kalendar. Cr. Jac. 167. Count in a Surmiſe by the Kalendar. 2 R. 521. Lit. Rep. 19. 1 Le. 31. Co. L. 135. b. 6 Co. 62.

(212) Swain *againſt* Hollam. Waſte.

Tr. 14 Jac. 755.

ACtion of Waſte between Swain and Hollam of Lands in Com. Dorſet. The Parties were at Iſſue upon a Surrender made in Middleſex. The Queſtion was, How the Writ of Seiſin ſhall be awarded, which muſt be per viſum Juratorum. Hutt. 8. a. Poſt. 207, 226.

(213) Caſe. Caſe.

ACtion upon the Caſe for calling one Baſtard; the Defendant juſtified, that he was a Baſtard, and it was awarded that this ſhould be tried per pias, and not by the Ordinary. 4 Co. 17. a. 12 Co. 67. Co. L. 134. a. 5 Co. 11. 7 Co. 71. a. Baſtardy ſhall be tried by Jury in Action upon the Caſe. 1 Ro. 361. Palm. 301. Plo. 14. b. 9 Co. 32. b. Poſt. 296.

(214) Points *and* Gibbons. Partition. Rolls. Ab. f. 138.

IN a Writ of Partition upon the Statute, by Points againſt Gibbons, being within Age, the Defendant was denied his Age. Co. L. 171. a. Cr. Jac. 111, 392. Age is not grantable in Partition. 6 Co. 4. b

Treſpaſs.

(215) Wheatley *againſt* Stone.

: Roll. 222.

Paſch. 14 Jac. Rot. 545.

London. Judgment, Br. 30. ſeveral Præcipes, 8. Dr. & Student, 33.

WHeatley brought an Action of Treſpaſs againſt Stone, in the King's Bench, and declared, that he levied a Plaint of Debt in the Counter of London againſt one Warkins, and upon Proceſs he was arreſted by one Weſt a Serjeant, and that Stone vi & armis did reſcue him, &c. whereby he loſt his Debt. Upon Iſſue not Guilty, and Verdict for the Plaintiff, Judgment was given & quod defendens capiatur; whereupon Error was now brought in the Exchequer Chamber, and the Judgment was affirmed: For though the Nature of the Action properly is upon the Caſe, as touching the Plaintiff's Loſs or Damage of Debt, yet being done with Force, and that Force being done, though not to the Plaintiff himſelf, to the Serjeant, who was Miniſter as well for him, as to the Court, he may make his Action vi & armis. And the like Precedent was ſhewed out of the ſame Court, M. 34 & 35 Eliz. Rot. 169. between Margaret Aſtel, and Hugh Ridge; and another of the ſame M. 42, 43 Eliz. Rot. 468 between Andrew Pawling, and Robert Marriot; and on the other Side, Paſch. 14 Jac. Rot. 564 London: Robert Spear brought an Action upon the Caſe, upon the like Arreſt and Reſcue, vi & armis expreſly, and the Judgment was given in miſericordia. And that being alſo brought before us by Error, this Term we affirmed the Judgment; and the like had been, Hill. 6. Jac. Rot. 722. in the King's Bench, and affirmed upon a Writ of Error; for it was reſolved that the Caſe, though the Reſcue were laid vi & armis, would bear either Treſpaſs vi & Armis, or Treſpaſs upon the Caſe. But the Plaintiff muſt beware that he follow his Original, if it be by Writ; for if that be vi & armis, or upon the Caſe, the Judgment muſt be Suitable.

9 Co. 50 b. Cr. Car. 325. Hutt. 98.

And ſo muſt it be in a Bill in the King's Bench. But if the Bill be Treſpaſs general, neither ſaying vi & armis, nor upon the Caſe ſpecially, he may uſe it to either. 1 Cro. 325.

Caſe.

(216) Slowley *againſt* Eveley.

Tr. 12 Jac. Rot. 983.

2 H. 42. 2 Cro. 439. m. Nonſuit, Br. 8. Rolls R. f. 264. Bulſ. 2. R. f. 326. m. Ante. 66, 70. Cr. Car. 439, 243. 2 Le. 177. 2 Ro. 100, 134. C. Car. 230. Non ſuit in Part. 2 R. 134. ab il fait quere ſi ceo ſoit mis print, Mo. 624. Cr. Car. 243, 551. Noy. 42

SLowley brought an Action of Treſpaſs againſt Eveley, in the King's Bench, for beating and impriſoning of him, and had Judgment: And upon a Writ of Error in the Exchequer Chamber, the Court, upon Occaſion of an Error aſſigned, took this Difference; that where a Man hath a Perſonal Action againſt two Defendants, if they plead ſeverally, and he be Non-ſuit againſt the one, before he hath Judgment againſt the other, that he ſhall be barred againſt both, for it works in the Nature of a Releaſe of the whole. But where there is but one Defendant, and he pleads to one Part in Iſſue, and to the other Demurs, the Plaintiff may be Non-ſuit for one Point, and proceed for another.

Caſe.

(217) Sydenham *againſt* May.

Mich. 13 Jac. Rot. 347.

Action for Words not altogether the ſame. 2 Ro. 718. 1 Roll. 48, 49. 1 Roll. Rep. 427. 2 Roll. 717, 718. 2 Cro. 407. Bulſ. 3d. R. f. 260.

SIr John Sydenham brought an Action of the Caſe againſt Timothy May, Clerk in the King's Bench, for theſe Words (if Sir John Sydenham might have his Will, he would kill all the true Subjects in England, and the King too) and he is a Maintainer of Papiſtry, and of Rebellious Perſons. The Defendant pleaded other Words abſque hoc, &c. And the Jury found that he ſpake the Words, viz. I think in my Conſcience, that if Sir John Sydenham might have his Will, he would kill all the Subjects in England, and the King too, and he is a Maintainer of Papiſtry, and Rebellious Perſons; and if upon the Matter he be guilty in ſpeaking the Words in forma qua in the Declaration, then, &c. and if not, &c. and Judgment was given for the Plaintiff.

Plaintiff, and now upon a Writ of Erroꝛ in the Exchequer Chamber, the Court inclined againſt the Defendant; foꝛ the Matter is in Effect the ſame, and the Foꝛm muſt be underſtood, the Eſſential Foꝛm, not accoꝛding to every Woꝛd: Yet Paſc. 16 Jac. we inclined that either of theſe Woꝛds would bear Action; but the Woꝛds found were not ſo abſolute as the Declaration, neither moved Credit in the Hearer ſo fully, which is the Foꝛce of a Slander; and then they are not the ſame Woꝛds in Foꝛce and Effect, as if the Woꝛds were laid, I know him to be a Thief, and it were found, I think him to be a Thief. Cr. Jac. 407, 469.

(218) Howard *againſt* Bartlet.

VIſcount Howard was ſeiſed of the Manoꝛ of Stockwood in Dorſetſhire, whereof the Cuſtom was, that the Copyholders foꝛ Lives, their Widows ſhould enjoy, during their Widowhood, their Cuſtomary Lands, whereof their Husbands died ſeiſed: The Viſcount, Anno 5 Eliz. granted a Cuſtomary Tenement of that Manoꝛ unto John Bartlet foꝛ Life, by Copy; and 19 Eliz conveyeth the whole Manoꝛ to Winterhay, who at the ſame Year conveyed the Inheritance, and Freehold of Bartlet's Tenement foꝛ Money, paid by Bartlet to Whitby and others, and their Heirs and Aſſigns, during the Life of John Bartlet; the Remainder to Ellen then Wife of Bartlet, the Remainder to John Bartlet himſelf in Fee. 2 Cro. 573. 1 Roll. 502. 10, 11. 2 Ro. R 178. Hutt. 18.

The ſame John Bartlet, 28 Eliz. did grant his ſaid Remainder in Fee to William his Son, and his Heirs, to whom Whitby and the reſt releaſed. Then William Bartlet having Iſſue William (who is now a Ward) died; and then Ellen the Wife of John Bartlet died: And John Bartlet married again one Frances, and died ſeiſed of his Cuſtomary Eſtate, 14 Jac. and then Frances his Wife entered.

Upon this Caſe it was reſolved by us, three Aſſiſtants, that Frances was to enjoy her Widow's Eſtate, in this Land. Foꝛ firſt, it was clear, that the Cuſtomary Eſtate of J. Bartlet remained as it was during his Life, not extinct, noꝛ altered by the Purchaſe of a Feeſimple, which during his Life was in others, not in him; whereof it follows by Conſequence, that all cuſtomary Incidents to ſuch a cuſtomary Eſtate remain, whereof there is one, which is as an Excreſcence, which by the Cuſtom and Law grows of it ſelf out of that Eſtate, even as a Deſcent ſhould have done, if Bartlet had been a Copyholder in Fee, and the Freehold had been granted to another in Fee. But if ſo much as an Admittance only were requiſite befoꝛe her Eſtate could veſt in her, it were dangerous; as if it were a Dower which could not be had but by Suit; foꝛ that were loſt, becauſe the Cuſtomary Court that ſhould relieve her is gone as to her, foꝛ her Eſtate is utterly eſtranged from the Manoꝛ: But now this Eſtate is as it were a Part oꝛ Fruit of the other, and is caſt upon her, and veſted by Law. And Paſche 16 Jac. upon a Trial in ejectione firmæ, between Leſſee to the Widow of one Walter Rennington, claiming a Widow's Eſtate in Land in Soutſcemy in Glouceſterſhire, againſt —— foꝛ Sir Edward Withipole: It fell out that ſhe was indeed married to Rennington; and they cohabited; but ſhe being Neece to his foꝛmer Wife, he was queſtioned, as foꝛ an inceſtuous Marriage, and put to Penance by the High Commiſſion Court, and bound from her Company, and then died: And then the Woman came into the Court to pꝛay her Widow's Eſtate, and was denied. And we reſolved, that her Widow's Eſtate was due to her, in as much as ſhe was never divoꝛced a vinculo, though there were Cauſe.

A Widows Eſtate in Poſſibility continues as long as the Husband's Eſtate. 2 Cr. 126. March 163 Cr. Jac. 36, 37.

4 Co. 24. b. 2 Co. 17 a.

Hutt. 18. ſame Caſe. Noy. 29. 2 Keb. 294. Vaugh. 249, 322. Noy. 29.

Co. L. 235. a. Syd. 432.

Next, we held that the Action was maintainable againſt the Loꝛd without Admittance, foꝛ the Reaſon in the foꝛmer Caſe. And Warburton and Hutton did alſo rely upon the Refuſal to admit, in which Caſe they thought the Law would ſupply the Admittance.

Yelv. 16. pluis fort Caſe.

Bruton

Raviſhment. (219) Bruton *againſt* Morris, and others.

Star-chamber. Hutt. 2. 2 Cro. 485, 486.

3 Inſt. 61.

JOhn Bruton exhibited a Bill in the Star-chamber againſt Edward Morris, and others, and complained, that he having one only Daughter of the Age of Twelve Years, or thereabouts, and having in Lands and Goods to the Value of five Thouſand Pounds; the Defendant Morris did cauſe his Daughter to be allured from his Houſe in Southwark, down the Thames to ſee a Ship, and having her ſo aboard, afterwards by Force and Threats carried her into Suffolk, and there married her.

Upon the Stat. 3 H. 7. cap. 2. of taking away an Heir. 12 Co. 20.

Now the Truth was, that this Bruton had alſo a Son, though it were not ſo laid in the Bill, ſo that his Daughter was neither Heir apparent to her Father, nor had Lands or Goods: Whereupon Queſtion ariſing, whether this Caſe were within the Statute of 3 H. 7. cap. 2. and ſo Felony, and not examinable by this Court. It was ordered, that the Chief Juſtice and I ſhould conſult with all the Judges, which we did: And upon Conſideration of the Statute, and View of Precedents of former Indictments in the King's Bench, we reſolved, that this Caſe was not within the Statute; for though the Words of the Purview ſeem general to all Women, taken Unlawfully againſt their Wills; and that this Maid, though ſhe were firſt trained out with her Conſent, yet was afterwards by Force carried away, which was as a Forcible taking then begun, becauſe ſhe was before in her own Power. It was conſidered, that the Preamble of the Statute could not be thought to be Idle, but meant to reſtrain the Purview to the Particular Caſes of the Preamble in the Enumeration of the Women, and their Eſtates and Conditions; and alſo the Motives and Ends of their taking, that is, that they ſhould be Maids, Widows, or Wives, that had Subſtance in Goods or Lands, or ſhould be Heirs apparent; that the Motive ſhould be Lucre, and the End to marry or deflower; and the Purview following, that what Perſon or Perſons ſhould take a Woman ſo againſt her Will Unlawfully,

Hutt. 2.

&c. it was conceived, that this Word (ſo) did implicitly bind up the Preamble in the Purview, for elſe the Word (ſo) were Idle, and might be ſpared, if it did not include the Motive and End of the Action, which is a Part of every Action, as being the Cauſe of it, which in this Caſe are Lucre and Luxurioufneſs. And that was alſo conceived to be the Meaning of the Law, as being like to be the Common Caſe; for Men will not commonly ſteal Women that are nothing worth. Yet it was objected, that by this Conſtruction, the Taking of a Maid inheritable to Twenty Acres of Land ſhould be Felony, and the Taking of a Daughter of the greateſt Peer of the Land ſhould be no Felony. And alſo, that there could be no Lucre in ſtealing of another Man's Wife, neither could the Raviſher marry her. Alſo, the Proviſo in the End is, that the Act ſhall not extend to any Perſon taking away any Woman, claiming her as his Ward only, or Bond-woman, which ſeems to reſpect only the Taking without the Word (ſo.) There were alſo ſome Indictments found in the King's Bench: One, Northton Paſ. 19 H. 7. againſt one Higford, and another Norff. Pa. 6 H. 8. againſt one More, and another Kanc. Hill. 3 & 4 Phil. & Mar. againſt Palley, that ſpake neither of Lands nor Goods, nor Heir; but on the other Side, as well thoſe Indictments, as all others that were found, did recite the Preamble of the Statute; and the reſt, being ſeven or eight, did all lay the Women taken to be Heirs, or poſſeſſed of Lands or Goods. And one Indictment which was

1 Cr. 484.

Norff. Paſ. 13 H. 7. againſt one Sturges for the Taking Agnes Hopſon, was put ſine die for Inſufficiency, and one Fault was entered, becauſe there was no Mention to what Intent he took her, whether it was to marry her, or to deflower her.

Savill, 59. Accord. 1 Cro. 485, 488, 492, 493. 1 And. 115, 160.

And another, Ebor. Hill. 3 & 4 Phi. & Ma. againſt one Tompſon, for taking Margaret and Margerie Button, was alſo put ſine die for Inſufficiency, and one Fault was entered; becauſe it was not ſaid, that he did indeed marry, or deflower them, or either of them prout per tenorem Stat. prædict. fore deberet. Alſo Hill. 26 Eliz. my Lord Anderſon in his Book of Reports hath it thus: It was agreed by the Juſtices, that if a Woman be taken againſt her Will, and

and menaced to contract her self in Marriage, but yet is not married indeed, that this is no Felony; but if she were married, or defiled, it were Felony; for though the Body of the Law say, that such a Taking shall be Felony, yet it shall be aided by the Preamble, which makes the Marriage or Defiling material. And one other Indictment, Insula Elienſi in Com. Cantabr. Paſ. 35 Eliz. (discharged by Pardon in Parliament against William Harrison, for taking, &c. Anne Lewis, the Wife of Thomas Lewis at Ely, she being seised of Lands in Ely of Twenty Pounds per Annum; and that one David Eyre knowing her to be so Unlawfully, and Feloniously taken away, the same Anne by the Procurement of the said Harrison at Ely aforesaid, took to Wife. 1 Cr. 485. 3 Inſt. 61. 1 And. 115.

Now since the Marriage or Deflowring is made a necessary Part of the Indictment, it follows, that the Purview of so taking is expounded and restrained by the Preamble; and the Motive of Lucre is more incorporate into the Act of taking, as being a Precedent and an efficent Cause of it, than the Marrying or Deflowring, which is an Accident following after the Act, and perhaps was not purposed, when he took her away.

Quære, if the Taking, and the Lands, and the Marrying or Deflowring, were in several Counties; for it is Felony composed of all those three Things, as Murder is of the Stroke and Death. Cr. Car. 485, 488.

(220) Davison *against* Barber. Hill. 14 Jac. Rot. 2318. Information.

EDmund Davison qui tam, &c. sued an Information in the Common Pleas against William Barber, for exercising occupationem De les Bakers, by Eleven Months in the City of Norwich, and upon Issue not Guilty, found for the Plaintiff; Richardson excepted in Arrest of Judgment, that it should have been in the Occupation of a Common Baker; but that was not regarded. Another Exception was taken, that by the Statute of 5 Eliz. the Forfeiture arising upon Offences committed within Cities and Towns Corporate, is given to the Use of the City or Town Corporate, whereof the Consequence was urged by me, that if the Clause were so to be understood, then this Information could not stand, which was for the King and the Informer. And this Doubt depends upon two Branches of that Statute, the first, somewhat before the End of the Statute after all the Forfeitures, given in these Words: That the one half of all Forfeitures and Penalties mentioned in this Statute, other than such as are expressly otherwise appointed, shall be to the Queen, the other half to the Informer. 2 Cro. 499. Moor f. 886. 8 Co. 129. b. 11 Co. 54. a. Cr. Jac. 178, 498. Stat. 5 Eliz. Cr. Car. 316. Whether it give the Penalty to Cities and Corporate Towns

The other Clause is nearer the End in these Words, that all Manner of Amerciaments, Fines, Issues, and Forfeitures which shall arise by Reason of any Offences, or Defaults mentioned in this Act, or any Branch thereof within any City, shall be levied to the Use and Maintenance of the same City, in such sort, as any other Amerciaments, Fines, Issues or Forfeitures have been by reason of any Grant made by the Crown to the same City, in such sort, as any other Amerciaments, Fines, Issues or Forfeitures have been by Reason of any Grant made by the Crown to the same City, any Clause in this Act to the Contrary notwithstanding. Hereupon I was of Opinion, that the Word (Forfeiture) in this latter Clause was not to be understood of the main Penalty of the Law, for two Reasons. Cr. Car. 316.

First, because it was penned beginning with Amerciaments, &c. which imports the Forfeitures of the like, or less Nature: Again, that it appoints them to be levied, in such sort, as other Amerciaments, &c. granted to such Cities, are to be levied, which are of Record, and due as soon as they are imposed, and want nothing but the Levying. Now Fines, Issues and Amerciaments are often granted to Cities; and yet that could not extend to the like growing upon Suits, upon Offences made by new Statutes. Note, those are not due 'till there be a Conviction; so the Question is of the Suit, not of the Levying.

But no City hath or can have Grant by Charter of any Penal Law: And where it was urged, that the former Clause did except from the Queen, the Penalties otherwise appointed, which must needs be understood of these: 7 Co. 36. b. Ant. 155.

There

There is in the Statute five Pounds Forfeiture given againſt him that departs without Licence out of a Work undertaken, to him from whom he departs. At Coventry, the Summer Aſſiſes 17 Jac. Hobart, Juſtice of Aſſiſe there, adviſed Stapleton to give Judgment for the Informer in the Sheriffs Court there.

Poſt. 327. 2 Cr. 78, 347, 538. Cr. El. 326, 327, 737. Cr. Car. 112. 2 Cro. 85, 178. Syl. 383. Syd. 303. Poſt. 327.

Another Exception in this Caſe was, that this Information ought to have been in the Quarter Seſſions, Aſſiſe or Leet, upon this Law, by the expreſs Proviſion of the Statute of the 31 Eliz. which I hold to be plainly ſo; for that Statute hath one general Clauſe; that upon Penal Laws the Offence ſhall be laid to be done in the County where in Truth it was. A ſecond Clauſe there is, exempting ſome Offences out of that general, which may ſtill be laid in foreign Counties. Then follows the third Clauſe, which provides expreſly, that for the Statute of Unlawful Games, Boys and Apprentices ſhall be ſued and proſecuted in Seſſions and Aſſiſes, or inquired, heard, &c. in an Aſſiſe, &c. or in the Leet, &c. Note, the Reaſon and Intent of the Law to caſe the Subject diverſly, and moſt, in theſe petty Offences: Note the Difference of Words, in the firſt Clauſe, the Offences ſhall be laid; in the third Clauſe ſhall be ſued and proſecuted, and not in any wiſe out of the ſame County; but it may be ſome Queſtion whether thoſe petty Offences being committed in Midd. may not be ſued in Courts of Weſtminſter ſitting in Midd.

2 Cro. 85, 179.

Debt. (221) Revell *againſt* Gray.

Debt counting upon Parcels. Ante. 88. Noy. 19. 8 Co. 87. b. Cr. Jac. 110.

REvell brought an Action of Debt againſt Gray, and his Wife, for three Pounds and Eighteen Shillings, and counted for Thirty nine Shillings, upon a Contract of the Wife's, Dum ſola fuit, and the other Thirty nine Shillings upon an inſimul computaverunt, with Gray the Husband only, and after Iſſue nihil debent, found for the Plaintiff: Judgment was ſtayed.

(222) William *S.* Andrews *againſt the* Biſhop of York, Mary Counteſs of Shrewsbury, *and one* Hacker.

Mich. 15 Jac. Rot. 32.

Aſſiſe of a *Darr.* preſentment hanging a *Quare Imped.* Winch. Ent. 813. & 816. 5 Co. 61. a. b. Brownl. 1. R. 27. Mo. 883. Hutt. 3. Noy. 18

WIlliam S. Andrews brought a Writ of Aſſiſe of Darrein Preſentment againſt the Biſhop of York; Mary Counteſs of Shrewsbury, and one Hacker; the Biſhop made Default: And the Counteſs and Hacker pleaded in Abatement, that the Plaintiff, before this Writ purchaſed, brought a Quare Impedit againſt the ſame Defendants, and ſhews all certain, which remains undetermined; and avers, that they are both of the ſame Avoidance: And

Judgment.

upon Demurrer the Writ was abated by Judgment.

Caſe. (223) Male *againſt* Ket.

Hill. 14 Jac. Rot. 150.

Action for Words of Pety-larceny. Roll. 1. Abr. b. 43. Hutt. 65. Mo. 883. Brownl. 1. R. 2. Cr. El. 563. Winch. 6. Accord.

MAle brought an Action of the Caſe againſt Ket, for ſaying, that he had ſtoln his Corn out of his Barn. After a Verdict it was ſaid, it might be the Corn was not worth a Penny; yet Judgment was given for the Plaintiff; for it is Felony, though it be not Capital.

Caſe. (224) Chamberleyn's Caſe.

Trin. 15 Jac. Rot. 1952.

Amendment of the Record by the Book of Office. 1 Roll. 207. Ant. 119, 127. Amendment, Br. 30.

CHamberleyn brought an Action upon the Statute of Hue and Cry, and after Iſſue joined and entered where the Record was made, that the Robbery was done 30 Oct. It was ordered by the Court to be amended, and made 30 Septem. upon the Oath of Thurſton the Attorney, for the Plaintiff, that the Book of the Office was ſo, and ſhewing it.

Jones

(225) Jones *againſt* Jones. Prohibition.

MOtion was made for a Prohibition between Jones and Jones, upon the Statute of 23 H. 8. for being cited out of the Dioceſs: And the Caſe was, The Chancellor of the inferior Ordinary did make Requeſt to Doctor Donne Dean of the Arches to take the Cauſe to his hearing; and the Reaſon given by the Chancellor of the ſending it up was, that the Cauſe (being indeed a Cauſe of Modus Decimandi) was ſo difficult, that the Plaintiff could have no ſufficient Counſel there for that Cauſe. Citation out of the Dioceſs, where the inferior Ordinary may remit to the Metropolitan. Stat. 23 H. 8. cap. 9. Ant. 17. Cr. Car. 97, 162.

Now the Queſtion was, whether this tranſmitting of this Cauſe were warranted by that Exception in the Statute; which Exception is of two Sorts, the one for ſpecial Cauſes, there particularly expreſſed (whereof this was none) the other a general Clauſe thus: That in Caſe, that any Biſhop, or any other inferior Judge, having under him Juriſdiction in his own right and Title, or by Commiſſion, make Requeſt or Inſtance to the Archbiſhop, or other ſuperior Ordinary or Judge, to take, treat, examine, or determine the Matter before him or his Subſtitute; and that to be done in Caſes only where the Law Civil or Canon doth affirm Execution of ſuch Requeſt, or Inſtance, or Juriſdiction to be lawful or tollerable, upon pain to forfeit, &c. double Damages and Coſts to the Party for his Vexation; and alſo Ten Pounds, one half to the King, the other half to him that will ſue for the ſame. 13 Co. 6.

Hereupon we ſent for Civilians, and there came for the Defendant Doctor Talbot and another. Talbot ſaid, that by the Canon Law in the Beginning, there was but one Biſhop, who had ſole Juriſdiction, and was the immediate Ordinary throughout: Afterwards there were Suffragan Biſhops made under him, which brought in a Reſtraint of the Archbiſhops in their Dioceſs; but in ſpecial Caſes, which agrees with our Law, that an Adminiſtration granted by the Archbiſhop is but voidable. 8 Co. 135. a.

Then he ſaid, that the Juriſdiction of the Archbiſhop is opened (for that is their Phraſe) ſometimes by himſelf, nolente Ordinario, as in the Caſe of his Viſitation. And by the Party in Default of Juſtice in the Ordinary, as by Appeal, or Nullities. Again, it is opened by the Ordinary himſelf without the Party or Archbiſhop; as where the Ordinary ſends the Cauſe to the Archbiſhop: Panormitan. Archiepiſcopus eſt Ordinarius totius Provinciæ; non tamen habet exercitium niſi in Caſibus; and ſets down many Caſes: And amongſt the reſt this, Quando refertur ad eum quæſtio, vel tota Cauſa. And Hoſtienſis, cap. Paſtoralis de Officio Ordinarii. Certum eſt quod Metropolitanus, ſive ipſum dicemus Ordinarium totius Provinciæ, ſive non, non poteſt exercere Juriſdictionem ſuam in ſuorum Suffraganeorum ſubditos, niſi in Caſibus ſequentibus, and reckons 21 Caſes. 2 Keb. 512. Panormitan: Hoſtienſis.

1. Ubi ab Eccleſia ſua Metropolitana diſcrepat in Divinis.
2. Ubi ſubditus conqueritur de Epiſcopo.
3. Si appelletur ad ipſum.
4. Quando inter Epiſcopum & alium criminalis Quæſtio agitatur.
5. Ratione delicti Commiſſi in ſua Dioceſi.
6. Quando præcepit ſubdito Epiſcopi, quem reperit juſte excommunicatum, quod eidem Epiſcopo ſatisfaciat, & ſubditus non ſatisfacit.
7. Ratione rei ſuæ in ſua Dioceſi.
8. Quando ad eum refertur Quæſtio per conſultationem.
9. In his quæ tangunt communiter totam provinciam.
10. Quoad congregationem Concilii Provincialis.
11. In Injuriis notoriis ſibi, vel ſuis irrogatis.
12. Quando Epiſcopus negligens eſt in Juſtitia facienda.
13. Quando Canonici in contemptum Epiſcopi abſtinent à Divinis.
14. Quando notorium eſt ſententiam Epiſcopi non tenere.
15. Ratione Viſitationis annuæ.
16. Poteſt per totam provinciam indulgentiam facere.

17 Si non ſuperſint Canonici idonei vacante ſede, cuſtodit bona Epiſcopalis menſæ.

18. Ratione Privilegii ſibi conceſſi.

19. Ratione conſuetudinis.

20. Si inter Epiſcopum & Capitulum ſuum fiat permutatio.

21. Quando Epiſcopus, vel quia recuſatur tanquam ſuſpect', vel alia de cauſa mittit ei partes; & refert totam Cauſam; whereof the eighth Caſe is, Quando ad eum refertur Quæſtio ad conſultand. And ſpeculator titulo de Relationibus perag. Quando generaliter Judex poteſt facere Relationem, quandocunque ſibi videbitur expediens, ſc. ante litem, in medio litis, vel quandocunque.

Baldus. And Baldus being a Civilian, writing after Hoſtienſis, refers himſelf to him, and ſays, Archiepiſcopus eſt Judex totius Provinciæ; tamen Juriſdictio ſua eſt ſignata, & non aperitur niſi ex cauſis.

And Talbot ſaid reſolutely, that though Canon Law reſtrain the Archbiſhop to call Cauſes from the Ordinary nolente Ordinario, but in the 21 Caſes, yet the Law left it in the abſolute Power of the Ordinary, to ſend the Cauſe to the Archbiſhop abſolutely at his Will, without aſſigning any ſpecial Reaſon; and therein Hoſtienſis & Dominicus de foro competenti and other Authors do agree. And this Doctor Duke coming to us another Day with Talbot, yet being againſt him, did confeſs the Ordinary might conſult with the Archbiſhop at his Pleaſure, without Limitation. And they agreed, that the Caſes allowed by the Canon Law to the Archbiſhop, to call Cauſes from the Ordinary nolente to his own hearing, were more than this Statute doth allow. And touching the Trouble of the Subject, Doctor Talbot cited

Baldus. Baldus Cauſa 3. Qu. Secta, cap. penult, ex Synod. Roman. Neminem oportet exire de Provincia ad Provinciam, vel de Civitate ad Civitatem niſi ad relationem Judicis, ita ut Actor rei forum ſequatur.

Now to expound the Statute thus, that the Ordinary may at his Will and Pleaſure, ſend the Subject from one End of the Kingdom to another without Cauſe, is both againſt the Letter of the Statute, and eludes it utterly.

First, the Purpoſe of the Law was to provide for the Eaſe of the Subject, more than for the Juriſdiction of the Ordinary; which appears in that there is Action given to the Subject, and Penalty to the King for his Vexation, but none to the Ordinary. Again, the Archbiſhop by Statute is reſtrained to two Caſes of Neceſſity, much fewer than he had in his Power before, nolente Ordinario, which ſhewed that they regarded the Subject more than their Juriſdiction.

Ant. 178.

And this very Clauſe of referring, after it begins with referring generally, it checks it with this [that to be done in Caſes only, &c.] which were a vain Correction, if it left it as general as before, that is, if it were lawful or tolerable in all Caſes without Cauſe.

And no doubt the Statute was not made without Advice and Hearing of the Canoniſts, and therefore cannot be ſuppoſed to be ſo Ignorantly penned; and therefore this Caſe concerning ſo much the Eaſe of the Subject, deſerves much Conſideration.

In this Caſe in Queſtion, it is doubted whether the Form of the Statute be well obſerved, the Referring being from a Chancellor to a Delegate, and not from Biſhop to Biſhop.

Quære, if an Archbiſhop calls a Cauſe unto him, that is none of the Caſes within his Power, whether the inferior Ordinary have any Remedy againſt him, or can Recall it by the Canon Law, or whether the Defendant may plead it to the Juriſdiction.

Ant. 16. 1 Syd. 90. Accord. If a Peculiar be Subordinate to the Biſhop, then he cannot refer a Cauſe to the Archbiſhop; but to the immediate Ordinary, as an Archdeacon or Commiſſary muſt do; otherwiſe it is, if the Peculiar have his immediate Reſort to the Archbiſhop.

2 Keb. 228. p. 14. But if the Peculiar be free by a general Exemption from all ordinary Juriſdiction (which was common in the Caſe of Monaſteries, both by the Grants of Kings and Popes) then the Cauſe muſt be remitted to the King, as Appeals muſt alſo be in ſuch Caſes; and ſo it is provided by the Statute 25 H. 8. cap. 21.

Note,

Note, that a Prohibition lies upon this Statute, becauſe it hath Words Prohibitory, as well as Penalty annexed, for breaking the Prohibition. Otherwiſe it had been, if the Penning had been thus only: If any Man cite another out of his Dioceſs, he ſhall forfeit Ten Pounds. 13 Co. 8. 2 Cr. 321.

(226) Agar *againſt* Liſle.
Mich. 11 Jac. Rot. 318.

AGar brought an Action of Trover and Converſion againſt Liſle of a Cow, and laid it apud Caſtrum Ebor. The Defendant pleads, that the Biſhop of Durham hath a yearly Fair primo Junii at Darneton in Com. Durham, and hath Toll there, and tells what; and for Non-payment had uſed to diſtrain, &c. and ſhews, that the Plaintiff had bought Sheep of one, and Cows of another, and that this whole Toll came to ſo much; and that the Defendant, as Servant, &c. had demanded it, and upon a Refuſal took the Cow and detained her for the Toll; which is the ſame Converſion abſque hoc, that he was guilty apud Caſtrum Ebor. or elſewhere, within the County of York, or at any Time before the ſaid firſt Day of June, &c. Tro. and Converſion. Hutt. 10. Meſme Ca. 1 Brnl. 5. 1 Ro. R. 44. Jones 240.

Whereupon the Plaintiff demurred in Law, and ſhewed for Cauſe, that there was no Converſion confeſſed; and therefore no Anſwer to the Action; but he ſhould have pleaded not Guilty. And being now moved this Term, Mich. 15 Jac. Harris ſaid, that it was the common Experience, that the Detainment of Goods from an Owner, after Requeſt, is allowed for a ſufficient Evidence to maintain a Converſion. Whereunto I anſwered, that though Legally it were not a Converſion; yet in that Caſe it was Reaſonable to allow it for an Evidence to prove a Converſion: Becauſe, if you have Goods of mine Lawfully, by finding or Bailment, yet when I require them of you, you can no longer Lawfully hold them; and therefore when you ſtill detain them from me, it argues, that you claim them as your own, and ſo uſe them. 1 Cr. 157. 3 Cr. 434, 455, 495. 1 Cro. 262; 2 Cr. 245; 10 Co. 57. Syd. 127. 2 Cro. 245.

But in this Caſe it is otherwiſe; for here he hath not only a Lawful Cauſe to take the Cow, but as Lawful Cauſe to detain it, againſt Demand, as a Diſtreſs 'till the Toll paid; and yet he denies not the Plaintiff's Property, nor doth any thing againſt it; and ſo it was adjudged for the Plaintiff in this Caſe. Noy. 46.

(227) Freeſtone *againſt* Bowyer. Battery.

FReeſtone and his Wife brought an Action of Battery, and wounding of the Wife in Com. Salop. againſt Bowyer, who pleaded a Juſtification by Warrant of the Sheriff of Worc. & molliter impoſuit manus, &c. abſque hoc quod eſt culpabilis in Com. Salop; but anſwered nothing to the Wounding: And Verdict was given for the Defendant, and Judgment; becauſe it was but a Diſcontinuance upon the Point of Wounding, which is holpen after Verdict. 2 Cro. 353. 2 Cr. 304, 353. Co. L. 282. b. Verdicts help Diſcontinuance. 1 Syd. 96.

(228) Rives *againſt* Moxham.
Trin. 15 Jac. Rot. 559. Caſe.

RIves brought an Action upon the Caſe againſt Moxham, that where the Plaintiff lent unto the Defendant a Mare to plough his Ground by two Days; the Defendant at Chipnam promiſed, that he would deliver her ſafe at the End of the ſaid two Days; and he did, during thoſe two Days, exceſſively labour her that ſhe died thereof. The Defendant ſays, that ſhe died of Diſeaſes, abſque hoc, that he did ſo exceſſively labour her that ſhe died thereof. And it was found for the Plaintiff; and Judgment was ſtaid upon the Motion of Francis More, becauſe there were no Place aſſigned in the Declaration where the Labouring was, which is put in Iſſue, and therefore ought to be tried where it was: But if the Promiſe had been laid in one Place, and the Labouring in another, the Plaintiff might have taken his Choice to have brought his Action in either: But then the Venue Action ſhall be laid where the Cauſe of Action appeareth to riſe. Brownl. 1. R. 17. Moor, f. 887. Poſt. 189. 1 Cro. 21; 20. Cr. Eliz. 701; Cr Jac. 446.

and Trial ſhould have been accoꝛding to the event of the Iſſue non Aſſumpſit, oꝛ non laboravit. But note, that after in Hill. Term 15 Jac. Judgment was given foꝛ the Plaintiff; foꝛ the Viſne was taken from the place of Action, which ſhall be taken right where the Contrary appears not; otherwiſe, if the Labouring had been laid in another Place.

7 Co. 1. b. 1 Cr. 21.

Covenant. (229) Collins *verſus* Throughgood.

Collins againſt Throughgood Executoꝛ; an Action of Covenant was bꝛought againſt the Executoꝛ, and the Bꝛeach was aſſigned foꝛ Default of Reparation committed in the Time of the Executoꝛ, and Damages were aſſeſſed. And it was moved by Towſe, whether the Judgment ſhould be de bonis Teſtatoris, oꝛ propriis. And upon View of Pꝛecedents it was judged de bonis Teſtatoris: Foꝛ note, that it is the Teſtatoꝛ's Covenant, which binds the Executoꝛ as repꝛeſenting him, and theꝛefoꝛe he muſt be ſued by that Name.

Judgment againſt an Executor in Covenant, broken by himſelf, ſhall be *de bonis Teſtatoris*. 1 Ro. 93. Mo. 70. 1 Ro. 932. Hutton f. 35. Brownl. 1. R. 24. Cr. Jac. 647. 2 Cro. 191, 672. 1 Saund. 112. Dyer. 324. Poſt. 283.

Deceit. (230) Deceit.

Tr. 15 Jac. Rot. 924.

Action of Deceit bꝛought by A. B. foꝛ levying of a Fine of Lands in ancient Demeſne; and the Iſſue was, whether the Manoꝛ of little Bowden in Northampton were ancient Demeſne, oꝛ not. Whereupon Doomſday Book was bꝛought into the Court, and there ſhewed; whereby it appears, that the Manoꝛ of Bowden in Comitatu Leiceſt. was ancient Demeſne, but no ſuch in Com. Northampton, and ſo the Plaintiff was barred.

Ancient Demeſn tried by the Book of Doomſday. 9 Co. 31. a.

Prohibition. (231) Prohibition.

CHibborne moved foꝛ a Pꝛohibition, and the Caſe was; One ſued foꝛ a Legacy in the Court of Audience, and the Libellee pleaded a Releaſe, and pꝛoved it by one Witneſs. The Plaintiff denied not the Releaſe, but replied, that the Inteſtate that made it was an Ideot, and the Pꝛohibition was denied; foꝛ it was pertenent to the Cauſe, and their Juriſdiction: But if they will diſallow the Pꝛoof, becauſe it is by one Witneſs, which he made a Cauſe at the firſt, a Pꝛohibition will lie; foꝛ it is not ſufferable by our Law to diſallow that Pꝛoof againſt a Legacy, which is allowable by Law againſt a Statute, Recognizance, oꝛ Judgment, foꝛ that would make a Devaſtavit. But if they will except to the Credit of Witneſſes, oꝛ the like, they may accoꝛding to their Law.

In a Legacy the Court of Audience refuſe ſingle Witneſs. 2 Cro. 270. utra. Hutton 25. Accord. Mo. 413. Hutt. 23. Mo. 907. 12 Co. 65, 68. Noy. 12 Court Eccleſiaſtical ſhall have trial of Ideocy upon ſuit of Legacy. 3 Cro. 666. Yelv. 92, 93. Accord. Yel. 173.

(232) Harris *againſt* Cotton.

IN an Action of Debt upon the Statute of 2 E. 6. foꝛ not ſetting out of Tithes, Towſe moved the Court that the Caſe was thus, that the Coꝛn was growing upon the Glebe-Land of the Vicar's, which was diſcharged of Tithes being in his own Uſe; but if it were let out, did pay Tithes. Now the Vicar here did ſow the Land himſelf, being in his own Hands, and died befoꝛe it was ſevered, and his Executoꝛs did cut and carry the Coꝛn away, and he that had the Parſonage Appꝛoꝛpꝛiate bꝛought his Action, whereupon he pꝛayed the Opinion of the Court, whether he may plead Nihil debet. But the Court would give no Opinion, becauſe it hanged beſoꝛe them in Suit.

Statute 2 E. 6. 1 Brnl. 69. 1 Ro. 655. 1 Cr. 513. Godb. 19. Syd. 88, 181, 407. Poſt. 218. Mo. 833. Cr. El. 578. Degg. 233.

(233) John Harbin & Uxor *verſus* Green. Caſe.
Tr. 14 Jac. Rot. 2263.

Cuſtom of Suit to a Mill unreaſonable. Brownl. 1. R. 18. Moor, f. 887. Ro. 2d. Ab. 100.

HArbin and his Wife brought an Action upon the Caſe againſt Maurice Green, reciting, that the Biſhop of Sarum was ſeiſed in Fee, in right of his Biſhoprick of Sarum, of and in four Mills in the City; and there is a Cuſtom there, that all the Inhabitants reſident within the City, in an ancient Houſe holden of the Biſhop, &c. à tempore, &c. all their Grain whatſoever by ſuch Inhabitants in their ſaid Meſſuages ſpent or ſold at the ſaid Mills, and not elſewhere, without Licence, &c. have uſed to grind and pay for the grinding, and in Conſideration thereof the ſaid Biſhops, &c. à tempore, &c. have uſed to keep Servants, &c. to grind, and Loaders to carry, &c. and ſo conveys the Mills to them by Demiſe, made Anno 11 Jac. And that the Defendant dwelling in an ancient Houſe, &c. Dec. 12 Jac. & diverſis diebus & vicibus inter eundem diem & quartum diem Aprilis, Anno 12 Jac. Diverſa grana tam ſua grana in Meſuagio præd. expenſa quam venditioni expoſita ad alia molend. & non ad præd. molendinum, &c. molavit ad dampnum, &c. And upon Iſſue not Guilty, &c. it was found for the Plaintiff, and Judgment was notwithſtanding given againſt the Plaintiff, quod nihil capiat, for two Cauſes: Firſt, that the Cuſtom it ſelf was Unreaſonable, for the Reaſon and Uſe of ſuch a Cuſtom is, that the Corn that a Man doth grind, he ſhould grind there, and not elſewhere; and therefore both Sides are bound by the Cuſtom, the one to bring his Corn to grind there, and not elſewhere; the other to maintain his Mills and all Proviſions for grinding, and mutual Actions will lie on both Sides, if there be a Default. And it was holden, that this Cuſtom would as well hold for Corn brought, as for Corn growing within the Town, ſo it were ſpent within their Houſes, being ground both for the Conſideration aforeſaid. And the rather, becauſe the Houſes are holden of the Biſhop, though in a ſecta Molendini by the Tenure it would not be ſo. But the Fault here is, that by this Cuſtom if a Man buy Corn, he cannot ſell it again in Corn in his Houſe, for he muſt firſt grind it at theſe Mills. And he hath aſſigned the Breach as well in Corn ſold as ſpent. And I am of Opinion, that if he had aſſigned it only in Corn ſpent, yet it would not have ſerved, becauſe the Cuſtom it ſelf being entire is totally void, though ſome Part of it alone might be good in Law.

Another Fault was, that he aſſigned the Breach Anno 12 & diverſis vicibus between that Anno 2. which was long before the Plaintiff's had Intereſt, and the Damages was given entire, upon not guilty to the whole, which Damages ſhall be underſtood to be given not according to the Law, but according to the Allegation of the Plaintiff, who layeth his Damage for all, and the Verdict of Lay-men, who find him guilty de præmiſſis to the Dammage of, &c. and makes no Difference that the ſpecial Breach is right, Anno 12. and the reſt cometh by diverſis diebus, like a Treſpaſs with a continuando, for which Damage is alſo given.

Note, there was no Mention that the Action was brought by the Husband and Wife both; being only to recover Damage, and not for the Term. 2 Cro. 207. Yelv. 226

(234) Gogle's Caſe. Treſpaſs.
Tr. 15 Jac. Rot. 3209.

GOgle brought an Action of Treſpaſs, Quare clauſum fregit, &c. at Barningham. The Defendant pleaded, that he was ſeiſed of an Houſe, &c. in Coleby in the ſame County, and preſcribeth to have a Way from the ſaid Meſſuage over the Ground in Queſtion to a common Way leading to the City of Norwich, and Iſſue taken upon the Preſcription, and the Venue was taken from Barningham and Coleby, and found for the Plaintiff, and Judgment was moved to be ſtayed upon the Motion of Richardſon, becauſe there was no Place aſſigned where that way (leading to Norwich) lay, which is now made Part of the Preſcription and Iſſue, and therefore muſt have his Venue and Trial, though the Material Part of the Way was only whether it lead over this Ground or no, where he might have left, and then the Trial, if

Norff.

Hutt. 10. Meſme caſe. Ant. 187. 2 Cr. 599. 3 Cr. 426.

Preſcription for a Way.

Judgment. Yelv. 164. Accord.

if it had been againſt that Preſcription had been well. But in Hill. Term the Plaintiff had Judgment, for though a Way muſt be pleaded à quo termino ad quem, becauſe you muſt not go over my Grounds but to the right Place, yet becauſe here the Viſne is from all the Places named in the Record, the Trial ſhall not be avoided by a meer Imagination that the Highway lay in another Town, for it may lie in the ſame, and no Trial hath been voided, but where the other Viſne hath appeared in the Record.

(235) Leets *and* Edwards.
Tr. 15 Jac.

Whether the Common be Extinct, &c. Noy. 136. Yel. 189. Mo. 667. 1 Brnl. 69. 173. e' Extinct, 190.

BEtween Leets and Edwards the Caſe was, that a Coppholder of Inheritance, which hath Common appendant in another Manor, purchaſed the Freehold and Inheritance of the Copphold, whether the Common be thereby Extinct. Adjudge, 1 Bulſt. 2. 2 Brownl. 209. que cy 1 Brownl. 220. Maſſon & Hunt loy eſt in meſme & mar' 2 Cro. 253. meſme Caſe, & 126.

Debt.

(236) Dorrel *verſus* Andrews.
Mich. 14 Jac. Rot. 2327.

Entry and Expulſion, &c. Meſme Hutt. 6.

ACtion of Debt was brought by Mrs. Dorrel againſt Andrews a Knight, upon a Leaſe made by her to him in Truſt for Truſſel, for 75 Pounds a Quarter's Rent, and declared of a Demiſe de toto illo Meſſuagio capitali Maner. & domo manſionali cognit. per nomen de Cauſton infra parochiam de Dunchurch ac omnia horrea ter. tenementa, &c. ſcituat. in Cauſton. The Defendant pleads an Entry and Expulſion out of the Garden-houſe, and well, though Parcel of the Tenements, &c. whereupon Iſſue, and the Venue was de Cauſton. infra parochiam de Dunchurch, and the Plaintiff had Judgment notwithſtanding Exception taken to the Venue.

Judgment.

(137) Goffe *verſus* Browne. Obligation.
Tr. 5 Jac. Rot. 1618.

Winch. Ent. 309. 1 Roll. 256. Mo. 885. Cr. Jac. 352, 577. Hutt. 9. 1 Cr. 216, 217. Hutt. 29. Br. Arbitrament. 18. Cr. Jac. 664. Allen, 26. Arbitrament ſeeming larger than the Submiſſion.

GOffe verſus Browne upon an Obligation dated 23 Feb. Anno primo, to perform an Award of all Cauſes until the Day of the Date of the Bond. The Defendant pleaded Nullum arbitrium. The Plaintiff replieth, that 28 Mar. Anno 2. they made an Award & ſuper præmiſſis, that Browne ſhould pay the Plaintiff 20 Pounds at Mid. following in full Satisfaction of all Matters between them, and that they then ſhould make the one to the other general Releaſes of all Matters between them, and aſſigned the Breach for Nonpayment of the 20 Pounds. The Defendant demurred in Law, becauſe the Award did ſeem to exceed the Submiſſion, being for Diſcharge and Satisfaction of all Matters to the Day of the Award, which was more than was ſubmitted, for it may be that the Arbitrators might mean ſome Part of the 20 Pounds, in Diſcharge of thoſe Cauſes that might ariſe between the 23d of February and the 28th Day of March, which were not within their Power, and ſo for the Releaſe: Yet Judgment was given for the Plaintiff, which muſt be either, becauſe de & ſuper præmiſſis may report a Reſtraint to the Things ſubmitted, or elſe, that no new Cauſes ſhall be ſuppoſed except they were alledged (as in pleading of Awards of Cauſes they do not aver that theſe were all) or elſe, that the Award of all Cauſes may be reaſonably underſtood all Cauſes ſubmitted, being joined to de præmiſſis, and that therefore a Releaſe ſo made, ſhould have been a good Performance of the Award. See Tr. 43 Eliz. Rot. 946. a Caſe much alike; Debt by Barnes againſt Greenly upon an Obligation dated 4 Sept. to perform the Award of all Cauſes 'till the Day of the Date; the Plaintiff pleads the Award de præmiſſis, viz. of all Cauſes, till the third Day of September, and aſſigns a Breach, the Defendant maintained the Bar, ut prius quod nullum fecit arbitrium, and Verdict for the Plaintiff and Judgment. And here the Award was a Day ſhort of the Submiſſion, and upon this a Writ of Error was brought, and the Record removed, but what Iſſue it took I know not.

Judgment. Syd. 154, 252. 8 Co. 98. a. 2 Cr. 578, 664. 1 Cro. 217, 353, 448. 3 Cr. 861.

Award. Arbitrament ſeeming larger, or not ſo large as Submiſſion. 1 Cro. 216. Roll. 1. Abr. f. 257. Cr. El. 858. Hutt. 9. Judgment.

Theſe two Records were ſhewed upon an Action of Debt brought by Lea againſt Pain, 14 Jac. Rot. 953. upon a Bond dated January 13 Jacobi, for Performance of an Award of all Cauſes between them. The Defendant pleaded, no Award made; the Plaintiff replied, that in April 14. there was an Award made between them, ſecundum formam conditionis, de & ſuper premiſſis, ſcil. that the Defendant ſhould pay unto the Plaintiff 20 Pounds in full Satisfaction of all Controverſies until the Day of the Award; and that the Defendant paid it not; whereupon the Defendant demurred. Upon theſe Caſes the Court inclined ſtrongly to Lea the Plaintiff: And in Hill. 15 Jac. gave Judgment to him. And yet if the Defendant had paid the 20 Pounds, and the Plaintiff accepted it according to the Award, it would have ſatisfied and diſcharged any Treſpaſs, or the like, done by the Defendant to the Plaintiff between the Date of the Bond, and the Award, for it might be averred a Satisfaction for it. And ſo in theſe Caſes of Award it might have been averred, that ſome new Cauſe of Action had been grown ſince the Bond, and made known, and then the Court muſt have taken Knowledge, that the Award in that Point had not been warranted by the Submiſſion.

Hutt. 9. Moor 885. 1 Roll. 258. Brownl 1. R. 48.

2 Cro. 353. 8 Co. 98. a. Hutt. 29. Cr. Jac. 577, 578. Syd. 154. 2 Cr. 352, 664. 3 Cr. 861.

(238) Treſpaſs.

Tr. 13 Jac Rot. 3049.

Action of Treſpaſs, Quare vi & armis bona & catalla, viz. Palos, Ralos, &c. And after Verdict it was moved, that Ralos was no Latin Word, and yet Judgment given for the Plaintiff.

2 Cro. 307. 8 Co. 159. b.

(239) Gibs *verſus* Jenkins.

Tr. 15 Jac. Rot. 1634.

Gibs brought an Action upon the Caſe againſt Evan Jenkins, for ſpeaking of Welſh Words in the Preſence of divers underſtanding the Language, and did ſet down the Words in Welſh. Upon Iſſue not Guilty, after Verdict Witneſſes were Sworn for the Signification of the Words, and ſome affirmed, that the Words were commonly taken, and ſo underſtood for Stealing, which others denied; but both agreed, that the true and proper Signification of the Words was Bearing away. Whereupon Judgment was given againſt the Plaintiff.

Action for Welſh Words. Ante, 117, 126. Hutt. 8. Noy. 19

Judgment.

(240) Tooker *verſus* Loane. Prohibition.

Giles Tooker a Reader of Lincoln's-Inn and Charles his Brother, Adminiſtrators of Maude Tooker their Mother, by Serjeant Harris, moved for a Prohibition againſt Loane, and the Caſe was, that Maude had Iſſue the Plaintiffs, and John and Thomas, and Thomas had Iſſue nine Children, and John three, and were dead, the Children being Infants. The Adminiſtrators upon their Accounts before Sir John Bennet, by his Mediation, and not judicially, were content to make a Diſtribution of the Eſtate of the Teſtators per capita, not per ſtipites or è converſo, Loane being Curator ad lites for the Infants, appealed to the Delegates, and a Prohibition was granted becauſe the Ordinary hath no Power to make Diſtribution of the Surpluſage, nor to take Bond for it by the true Meaning ſpecially of the Statute 32 H. 8. which intends a Benefit to the Adminiſtrator, and not an unprofitable Burthen, and therefore gives a Preferment to the Wife and next of kin, &c.

Moor R. 864. Heti. 68. Carter's R. 126. Noy. R. f. 24. meſme caſe. Cr. Car. 62, 202. 823. Car. 2. cap. 10.

Stat. 21. H. 8. Exec. 96. the Ordinary cannot make Diſtribution of the Surpluſage. 1 Cro. 63.

Ante 83.

Scarlet

(241) Scarlet *againſt* Stiles.
Tr. 14 Jac. Rot. 541.

Suff. Brownl. 1. R. 2.

SCarlet brought an Action of the Caſe againſt Stiles for theſe Words, Thou didſt ſteal a Sack. The Defendant pleaded, that there was a Sack of a Man unknown ſtoln, and that the common Fame was, that the Plaintiff had ſtoln it; whereupon the Defendant did inform Thomas Kempe a Juſtice of Peace, &c, that he hath ſtoln, and in complaining and informing the ſaid Juſtice thereof, he did there, in the Preſence of Kempe and of the Plaintiff, ſay unto the Plaintiff, and of him, Thou didſt ſteal, &c. quæ eſt eadem, &c. whereupon the Plaintiff demurred in Law. 3 Leo. 107.

Dy. 236. p. 26.

(242) Berrie's Caſe.

Ant. 115. Noy. 28. Poſt. 301. Yel. 55. Diſmes, Br. 11. 2 Ro. 320.

BErry ſued for Tithes of Hay in ſpecie, and in a Prohibition Iſſue was taken, whether the Inhabitants had uſed to pay for all Tithes of Hay of all ancient Meadows within the Town a certain Rate-Tithe. The Jury find there was ſuch a Cuſtom for all the ancient Meadows, ſaving for certain called Barton Meadows, for which Tithes had been paid in Kind, and that the Party ſued (in the Spiritual Court) had Hay upon five Acres of the Barton Meadow. Now the Queſtion was, how Berry the Parſon ſhould have his Conſultation, for if the Jury had found againſt the Cuſtom generally (as they might well have done) he ſhould have had his Conſultation for all: But now that the Jury hath found the Truth diſtributively, that the Plaintiff had Cauſe to ſue in the Spiritual Court for one Part, but not for the other, we ſhall never give them a Conſultation to proceed in all, no nor in Part, where the Suit appears to us originally ill founded, and a Prohibition leaves more Power in this Court, than the other Actions, in as much as it locks up that Court which cannot require it to be opened but with a Key of Right and Juſtice, as in the Caſe of Pell and Sanderſon, M. 1 & 2 Eliz. Dyer 170, 171. A Man ſues for Tithes in Kind, the Defendant ſues a Prohibition upon a Surmiſe of meer barren Land paying no Tithes, whereupon Iſſue, and it was found that it was Barren, but yet paid a ſmall Tithe. So it was found againſt the Plaintiff: And yet Conſultation was denied, becauſe he ſhould not have ſued for Tithes in Kind, which if they ſhould grant, a Conſultation ſhould be allowed but for ſmall Tithe. But in this Caſe Berry muſt have Conſultation for the Barton Land only, for the Libel for Tithes in Kind for the 100 Acres is ſeveral for all or any Part, and therefore here for ſo much as was Barton and out of the Cuſtom it was well libelled, as if it had been for that alone.

Poſt. 300. 1 Cro. 166.

5 Co. 67. b.

(243) Thompſon *verſus* Comfort.

Norf.

INter Thompſon and Comfort Clerk, the Caſe was, that Comfort ſued for Tithes of Honey and divers other Things, the Plaintiff obtained a Prohibition for all the Tithes libelling ſaving the Honey. The Parſon had Sentence for all the Tithes before the Prohibition delivered, and after the Prohibition delivered, the Judge proceeded to the Execution of the Sentence for the Honey, and to Taxation of Coſts. If the Coſts were taxed before the Prohibition delivered (which muſt be then underſtood as large as the Sentence, which is for all) then muſt they not proceed to the exacting of all the Coſts; but if they did tax the Coſts after for the Suit of the Honey, though they ſet as much as they meant to give for all, they are out of the Danger of the Prohibition, for where the Cauſe belongs to them, the proportion of Coſts is of their Juriſdiction, and not of ours. Now if after the Prohibition, which was with an Exception, he taxed Coſts pro expenſis litis generally, without the quoad, &c. yet I think it well enough, eſpecially when his Intent appears to proceed upon the Principal, only for the Honey excepted.

Bicco

(244) Biccot *and* Ward. Caſe.

INter Biccot and Ward, the Caſe was, that one having an ancient Water-courſe, or River coming to his Mill, and the ancient Banks of the River being become falſe and hollow, by Direction of certain Juſtices, a Dam was made a Rood from the River Bank in another Man's Ground, and ſo the River was holden in. Now another, not Owner of the Ground, cut up that Dam, whereupon an Action of the Caſe was brought, and laid for cutting and ſubverting ripam cujuſdam rivi: Which coming to a Trial before me, after Evidence, I cauſed it to be ſtayed, leſt it ſhould paſs againſt the Plaintiff. And now the Court held the Declaration inſufficient, and I gave Direction, that he ſhould take a new Writ according to his Caſe de quadam ripa Anglice a Dam, includente Rivum prædictum. It was before laid to the Bank, Time out of Mind. North'ton. Ripæ Rivi.

(245) Winchcombe *and* Pulleſtone. Q. *Imped.*

IN the Caſe of Quare Imped. between Winchcombe and Pulleſton ſupra, after it was reſolved upon publick Argument, that Judgment ſhould be given for the King, it was prayed, that a Writ might be awarded to the Biſhop for the King; againſt which was objected, that it was Repugnant to the Record, in that Pulleſton the Defendant pleaded himſelf Parſon imparſonee; and again, in the End of his Plea ſays expreſly, that the King preſented him, and that he was admitted, inſtituted, and induced at the King's Preſentation before the Writ brought; ſo by the Record it appears, that the King hath the Effect of that, for which the Writ is required; yet becauſe it was affirmed by the Counſel of Pulleſton himſelf, that the Church was not full, but that his Plea in that Part was untrue, the Court entered into Conſideration what was juſt and fit to be done in this Caſe, and the like. Vide ſupra. 165, 166, 168. A Writ to the Biſhop where the Church ſeems full. Moor. f. 877.

First it was obſerved, that if there were not an Help, there would follow an inevitable Miſchief to the King and his Preſentee, if a Quare Impedit were brought againſt him before Induction; for whereas if the Quare Impedit were brought againſt the Clerk, or the Incumbent of a Common Perſon, he may abate the Writ, becauſe you name not his Patron with him, who may defend his Title, though he be not induced, ſo as he may plead himſelf. This is not ſo in the Caſe of the King, for he cannot be made a Defendant; but the Action muſt be brought againſt the Clerk alone, who cannot plead except he be induced, and ſo the Action muſt go againſt him; or elſe, if he plead himſelf induced to inable himſelf to his Defence, the ſame being untrue, though he win the Cauſe, yet neither he, nor the King, ſhall have Benefit of the Suit, by Writ to the Biſhop. Therefore it was conſidered. that though it was confeſſed of Record by Pulleſton, that the Church was full of the King's Preſentation, that this was not binding to the King, that was not Party to the Confeſſion. Now therefore ſuppoſe the Caſe to be, that a Quare Imped. were brought againſt a Common Patron and his Clerk, and the Patron ſets forth his Title to the Advowſon, and confeſſeth no Plenarty of this Preſentation, and the Clerk on the other Side would plead, as here Pulleſton doth, that he induced, &c. which were falſe, yet no doubt the Patron ſhould have a Writ to the Biſhop, for the falſe Plea of another ſhall not conclude him, the rather becauſe the Patron could not properly contradict his Co-defendant's Plea in that Point, much leſs ſhall the Defendant's Plea here conclude the King, that is no Party at all to this Suit in Point of Prejudice, and yet by a ſpecial Prerogative, the King is to take Benefit of his Title found as effectually, as if he were Party. 7 Co. 26. 2 Cr. 655.

Now it was obſerved, that as this were miſchievous to the King to be denied, if the Church were void, ſo on the Contrary, if it be full (as it was pleaded) it can be no Miſchief to Pulleſton; for either the King will not take

the Writ, or (if he do take it) the Biſhop may return the Cauſe of non execution, or if he ſhould admit another Clerk, it would be utterly void.

And it was further obſerved, that the Awarding of a Writ to the Biſhop was an Incident, and Part of the Form of Judgment in a Quare Imped. ſcil. Damages for the Diſturbance, and the Writ to the Biſhop for gaining the Preſentation. And therefore that Form of Judgment may be, where the Court ſees there can be no Fruit of it, as F. B. 39 D. A. brings a Quare Imped. againſt B. and B. brings an Aſſize of Darrein Preſentment againſt A. both for one Preſentment; B. hath Judgment in his Suit, A. is Nonſuit, B. ſhall have two Judgments, both of Writs to the Biſhop, and Writs for Damages. But the Court ſees that he can have but one effectual, ſo 11 R. 2. Quare Impedit 144. In Quare Impedit the Defendant pleaded, that the Plaintiff had filled the Church, hanging the Writ, whereupon the Plaintiff demurred, which confeſſed as much, and yet Judgment was given of a Writ to the Biſhop, and F. N. B. br. 35. C. agrees, that a Preſentment hanging the Writ ſhall not abate the Writ. And 7 H. 4. 34 & 36. a Quare Imped. was brought againſt two, whereof one pleaded an inſufficient Plea, whereupon Judgment is for a Writ to the Biſhop; and the other pleaded, that the Church was full of the Preſentment of the Plaintiff, the Day of the Writ purchaſed, and Hull there ſays, that if it be found ſo, yet the Plaintiff ſhall have his Judgment of Writ to the Biſhop. But 12 H. 4. 11. & 13 H. 4. 7. if a Patron have his Clerk in, he cannot afterward bring his Quare Impedit, for his Writ is falſe and abatable, for it is quoad permittat preſentare ad Eccleſiam quæ vacat. & 14 Ed. 3. Fitz. Quare Imped. 52. The King brought a Quare Imped. againſt a Prior alien, and made a Title to the King by Act of Parliament. The Prior pleaded, that the Church was full before the King's Title; whereupon Shard awarded a Writ to the Biſhop for the Prior, though he had pleaded the Church full. But indeed he did not plead, whether it was of his own Preſentment or others, and it was alſo in the Record it ſelf, for I cauſed it to be ſearched: So in the End Warburton, Winch, and I agreed, that a Writ ſhould be awarded to the Biſhop for the King, either ex officio Curiæ, as being a Part of the King's Judgment, and no way Miſchievous, or elſe (as Warburton defined) upon a Surmiſe of the King. So in the End the Judgment was drawn up and peruſed by me, and entered in hæc verba, thus.

Bre. Epiſcop. where the Church ſeemeth full by Record.

Octabis Mich. Ad quem diem hic venit præd. Ric. Pulleſton per Atturnatum ſuum præd. & ſuper hoc viſis omnibus & ſingulis premiſſis præd. & per Juſticiar. hic plene intellectis eiſdem Juſticicariis hic evidenter conſtat & apparet per veredictum præd. in forma præd. redditum, quod jus preſentandi idoneam perſonam ad Eccleſiam prædictam ratione Simoniaci agreamenti præd. inter præd. Willielmum Walker & præd. Wm. Say fact. ac per Jurat. præd. ſuperius compert. vigore Stat. præd. inde edit. & proviſi ad dictum Dominum Regem nunc ſpectat. & pertinen. ſuper quo præd. Ric. Pulleſton per Cur, hic allocat. ſi quid pro ſe habeat vel dicere ſciat quare bre. dicti Domini Regis pro eodem Domino Rege & de ſuper præmiſſis præd. Epo. adjudicari & demandari non debeat, dicet quod ipſe non dedicit, ſed bene cognoſcit & fatetur quod bre. illud pro dicto Dom. Rege Epo. in forma prædicta adjudicari & demandari debet, quodque ipſe die impetrationis brevis originalis præd. ſeu unquam poſtea in rei veritate non St. perſona Eccleſiæ. præd' impersonata in eadem ex præſentatione dict. Dom. Regis nunc (non obſtante placito præd. per ipſum ſuperius in contrarium inde placitato) Ideo conceſſ. eſt quod dict. dom. Rex nunc habeat bre. Epo. Winton. quod non obſtante reclamatione præd. Benedic. & Rici. idoneam perſonam ad Eccleſiam præd. & præſentationem dicti Dom. Regis nunc admittat, &c. conceſſ. eſt etiam quod prædictus Benedictus nihil capiat per bre. ſuum præd. ſed ſit in omnia pro falſo clamore ſuo, & prædict. Richardus eat inde ſine die.

1 Cr. 442.

1 Co. 22. a.

Tufton

(246) Tufton *verſus* Nevill. Star-chamber.

SIr Humfrey Tufton exhibited a Bill into the Star-chamber, againſt Maſter Chriſtopher Nevill, Son to the Lord Aburgavenny, for a Riot, and layed by way of Inducement, that Nevill had ſolicited his Wife to Unchaſtity both before and ſince his Marriage with her, and that this being made known unto him by his Wife, he cauſed her to write Letters to the Defendant, giving him Hope of her Inclination, and appointing him a Time by Night, and Place, at which the Defendant coming (and the Plaintiff with a Man diſguiſed like a Woman being there, expecting as much) the Defendant and others in this Company, made a Riot upon him and his Company.

To this the Defendant, as to the Riot anſwered. But as to the Solicitation of the Lady's Chaſtity demurred: Whereupon Motion being made in Court, though there were ſome of another Mind, yet it was reſolved and ruled, that the Defendant's Demurrer was good; and though it were urged, that this Inducement ſerved very much both to aggravate the Defendant's Riot, and to juſtifie the Plaintiff's Train, yet the Point of it ſelf was naturally alieni fori for the Spiritual Court, whoſe Proceeding in this Caſe was not to be uſurped nor prevented. Beſides the Fault of Solicitation is of ſo uncertain Acceptation, as is not fit here to be examined.

Solicitation of Chaſtity, is not examinable in the Star-chamber.

And laſtly, to examine ſuch a Fault by the Oath of the Delinquent, is not allowable with us, being a Delict that we cannot Cenſure, and it may prove Scandalous in the Event, if the Defendant ſhould upon his Oath (which were in him Excuſable, if the Court ſhould conſtrain his Anſwer) criminate the Lady, were it true or falſe, for that could never be ſatisfied, being a Point ſo ſecret as Solicitation only.

But this Bill were allowed, though it were a meer croſs Bill to the like before exhibited by Nevill againſt Tufton for the ſame Riot.

(247) Worceſter.

IN a Suit in the Star-chamber by the King's Attorney againſt Worceſter, it was agreed, that a Proceſs ad audiendum Judicium in that Court, is not holden ſerved ſufficiently by leaving it at the Houſe, though the Wife and Servants know it, but muſt either be delivered to his Perſon, or elſe he being at home, or otherwiſe proved by Affidavit to have knowledge of it. But if a Proceſs be left at the Houſe one Term for a Hearing, to be one Term after, ſo there be a convenient Diſtance of Time, it is ſaid by the Clerks, to be ſufficient upon Reaſon of Preſumption of Notice, and for the Miſchief in the Contrary: And ſo in this Caſe, where Proceſs was awarded.

Star-chamber. A Proceſs *ad audiendum Judicium* in Star-chamber how ſerved.

(248) Hall *againſt* Winckfeild. Debt.

HAll brought an Action of Debt 100 Pounds againſt Winckfeild, and declared upon a Recognizance taken before me in Serjeants Inn, in Fleetſtreet London, out of Term, and laid his Action in London, whereupon the Defendant demurred; and the Queſtion was, whether the Action ought to be brought in Midd. where the Recognizance is Recorded, or in London, becauſe the Entry of the Record is, that the Recognizance was acknowledged before me, at Serjeants Inn in Fleetſtreet London ſuch a Day, which was out of Term, ut ſupra.

Debt, or *Scire fac.* the Place where that ſhall be brought upon a Recognizance taken in London, by a Judge of the Common Pleas. 1 Brnl. 69. Mo. 884. 1 Cr. 317. Ant. 4. 2 Cr. 353, 382. Lieu. B. 85. Allen R. 12. Styl. R. 9. Vaugh. 103. Accord.

Whereupon it was agreed, firſt, that the ſeveral Judges may take Recognizance out of Term in any Part of England, as it was reſolved qurato Mar. upon View of Precedents, Brooke Recognizance 20.

Next, it was agreed, that though it were not a perfect Record, 'till it were entered upon the Roll, yet when it was entered it is a Recognizance

Ante. 165. Poſt. 222. Mo. 77.

from the first Acknowledgment, and binds Persons and Lands, as a Record from that Time. For it is the Acknowledgment before the Judge that gives it Force of a Record, though the Inrollment be necessary for the Testification, and Perpetuating of it. Again the Books are, and I agree, that if a Man recover Damage, or Debt in the Common Pleas, upon Trespass or Obligation laid in any other County, if the Plaintiff will bring an Action of Debt for the Sum recovered, he must lay it in the County of Mid. and not in the County where the first Action arose; and the Reason is apparent, for he must count upon the Record, by which it appears to the Court, that the Cause of this Action ariseth in Mid. where the Judgment was given, and the Record for that Trespass that was done, and that Obligation that was made in another County is not now the Cause of this Action, but the Judgment, which hath made novationem contractus, which begins there; and regularly it is true, that every Action must be brought in that County where by the Record it appears the Cause of Action began, which sometimes may admit an Election; as where the Admiral Court sits in Midd. and summons a Party in Essex, the Action upon the Statute may be in either of both Counties. And if a Man recover a Debt in the Court of Norwich, and will bring his Action of Debt upon that Record in the Common Pleas, he must lay his Action in Norwich. But now observe this Case, the Inrolment of the Record doth express, that the Recognizance was taken before me at the Place and Time aforesaid, by which (as is said) it was a Record ipso facto then and there, and the Inrollment of it is but a Complement and Consummation of the same Acknowledgment and Record, and makes no Change, as in the other Case: But because both concur to the making of it a perfect Record, it may be that the Action may be brought in either County.

P. 206. Yel. 218.

7 Co. 2. b. Lieu. Br. 85, 88.

But I am of clear Opinion, that it may be in London, as the first and more worthy Part of the Act, and therefore see 5 Mar. Brooke lieu 85. where it is resolved by all the Prothonotaries, that a Scire fac. upon such a Recognizance, shall be directed to the Sheriff of London, and not of Mid. And Gager cited a Precedent, that upon a Judgment given in the Common Pleas at Hertford Term, and the Records brought hither after, yet the Scire fac. went to the Sheriff of Hertford, and not to the Sheriff of Middlesex, whereof the Reason must be, because in the Record it self it appeared, that the Judgment was given at Hertford; and the like Reason is in this Case. But if the Entry of the Record were General, that the Recognizances were taken before me, it should be understood in Court, and then the Action were to be brought in Mid. See 18 E. 4. 18. 24 E. 3. 22, 73. 22 H. 6. 38. Br. lieu. 29, 36. & Brief 191.

Ant. 4. Cr. Car. 34, 313, 337. Cr. Jac. 484. Hetl. 20, 24. Yel. 218.

(249) Blount's Case of Common Recovery.

Common Recovery against the Infant. 1 Ro. 731, 751. G 1, 2. 2 Ro. 395. L. 4. 6. Jenk. Cent. 299. Jones 318. Hetl. 171. Noy. 140. Br. Coverture, 59. p. 324. 10 Co. 43. a. Styl. 246. Bridgment, 75. 3 Cro. 323, 472. Leys. Rep. 82, 83. Cr. Car. 307. Syd. 321.

MEmorand. that it pleased his Majesty by his Letters under his Priby Signet and Sign Manual, bearing Date 26 Novem. in the 15 Year of his Highness's Reign, to signifie unto me, and my fellow Justices of the Court of Common Pleas, that he had been humbly petitioned by Mountjoy Blount, being under the Age of 21 Years, as well by himself as his Friends Kindred and Feoffees, into whose Custody the late deceased Earl of Devonshire did commit his Estate in Trust, that he would declare unto us his liking, that he might be admitted to suffer a Common Recovery of the Manor of Wansted for the Payment of Debts, and in further Advancement of his own Means, to the Use of the Earl of Buckingham, which his Majesty by his said Letter did accordingly.

1 Syd. 321.

Now though we did never hold such Recovery very Unlawful, nor void in Law, yet we have refused many Motions of that Kind, as holding it very Inconvenient, but Convenience is discerned by Circumstances. And therefore I acquainted my Brethren. We determined, that I should send for the young Gent. himself, and examine him sole and secret, of the Reasons of this Recovery, and of his own free Will; which I did, and he, being 18 Years of Age or thereabouts, satisfied me of his own good liking, and that he

he did conceive it to be neceſſary for his Eſtate; yet not herewith contented, I cauſed the Earl of Southampton, the Lord Davers, and Maſter Wakeman, the Perſons to whom the World knew he and his Eſtate were committed in Truſt, and that they had worthily performed it. And calling them into the open Court, and queſtioning with them, they confeſſed to us all, that it was neceſſary for the young Gentleman, and for his Good, of their knowledge, to part with this Thing, and that therefore they had made Means to his Majeſty for this Letter in that Behalf, whereupon the Recovery was paſt openly at the Bar the laſt Day of this Mich. Term againſt Maſter Blount in Perſon, and the Earl of Southampton, the Lord Davers and Maſter Wakeman were admitted his Guardians.

Brownloe and Waller Prothonotaries gave me a Note of the like Recoveries againſt Infants, M. 23 H. 8. Rot. 441. P. 38 H. Rot. 128. T. 26 Eliz. Rot. 17 M. 26 & 27 Eliz. Rot. 45. & 72. P. 42 Eliz. Rot. 1. & 63. 44, 45, 69, 70, 89, 91, 94. P. 32 Eliz. Rot. 60. T. 38 Eliz. Rot. 41 H. 40 Eliz. Rot. 62. M. 41 & 42 Eliz. Rot. 13. M. 34 & 35 Eliz. Rot. 166. pro Zouch. M. 39 & 40 Eliz. Rot. 82. & 173. M. 41 and 42 Eliz. Rot. 29. & 156. & 72. Tr. 4 Eliz. Rot. 2. M. 42 & 43 Eliz. Rot. 173. Tr. 43 Eliz. Rot. 21. P. 41 Eliz. Rot. 112. and 124.

1 Cro. 307.
1 Leo. 211

(250) Brickhead *verſus* Archbiſhop of York.

Quare Imped.

Mich. 15 Jacobi.

RObert Brickhead brought a Quare Imped. againſt Toby Archbiſhop of York, and Alexander Cooke Clerk of the Vicarage of Lees: And ſhews, that divers Perſons were ſeiſed of the Advowſon of the Vicarage in Fee, and preſented Robert Cooke, and then brings down the Advowſon to the Plaintiff, and then ſhews, that by the Death of Robert Cooke the Vicarage voided, and it appertained to him to preſent, and the Defendants diſturb him to his Damage of 400 Pounds. The Archbiſhop pleads, that the Vicarage is within his Dioceſs of York, and that he Claims nothing in the Vicarage or Advowſon thereof, but Admiſſion, &c. as Ordinary thereof; but further he ſays, quod bene & verum eſt, and confeſſeth all the Titles as the Plaintiff hath laid it, and that the Church voided by the Death of Robert Cooke, and that it belongeth to the Plaintiff to preſent, as he ſuppoſeth. But he ſaith further, that the ſaid Robert Cooke died 1 Jan. An. 12 Jac. ac pro eo quod eadem vicaria Eccleſiæ præd. vacavit per tempus ſemeſtre poſt mortem præd. Roberti Crooke nulla idonea perſona ad eandem Vicariam per præfatum Rob. Brickhead infra tempus illud præſentata. Idem Archiepus. adtunc, &c. Ordinarius, &c. poſt tempus ſemeſtre illud elapſum ſcilicet 23 Dec. Anno 13 Jac. jure ſuo ordinario contulit præd. Vicariam præfato Alexandro Cooke & eum inſtitui & induci fecit, prout ei bene licuit. Et hoc, &c. unde petit judicium ſi, &c. abſq; ſpeciali impedimento in perſona ſua in hac parte aſſignato actionem, &c. habere debeat verſus eum. And Alexander Cooke the other Defendant pleads, by Confeſſion of the Plaintiff's Title, and the Collation, &c. by Lapſe altogether, as the Archbiſhop, unde petit Judicium, &c. The Plaintiff replies to the Archbiſhop, and confeſſeth that the Church voided 1 Jan. 12 Jac. by the Death of Robert Cooke, and that the Church remaining void, he did, after the firſt of January and before 23 Dec. An. 13 Jac. and within 6 Months, that is to ſay 20 May, 1615. by his Writing ſealed with his Seal dated the 27 of the ſame May, preſent unto the ſaid Archbiſhop, &c. one Richard Middleton his Clerk, praying him to admit him to the ſaid Vicarage, which he refuſed to do, and afterwards, viz. the Thirtieth Day of the ſame May, did Collate it unto Alexander Cooke, & hoc, &c. unde petit judicium & dampna ſua occaſione prædict. impedimenti præd. Archiep. nec non bre. eidem Archiepiſcopo ſibi adjudicari, and makes the ſame Replication to the Plea of Alexander Cooke the Clerk, and they both Demur ſeverally, upon the ſeveral Replications, and ſhew for Cauſe that they do contain double Matter, and are uncertain.

1 Roll. 198. Ebor. Goldby.

Quare Impedit and no Diſturbance before the Action.

Action brought before Cauſe of Action given.

As to the Cauſe of Demurrer expreſſed, namely the Doubleneſs of the Plea, after divers Arguments on both Sides, the Court was of Opinion, that the Plea was not double, the Doubleneſs or Trebleneſs was ſuppoſed in that

that the Plaintiff aſſigned his Preſentation, and a Refuſal of his Clerk, and a Collation by the Biſhop of his own Clerk. But it was holden by the Court, that the only material Part of the Plaintiff's Replication was, that he had preſented a Clerk; for the Subſtance of the Defendants Plea was, that the Plaintiff had not preſented any Clerk unto him within the 6 Months, and that he had afterwards collated.

Poſt. 233. Now to this the Replication ſays, that he did Preſent within the ſix Months, ſo there is a perfect Negative and Affirmative, which makes the Iſſue; but yet the Plaintiff muſt add a Refuſal to make good the Diſturbance laid, and then the Plea is Compleat; like unto the Caſe of an Action of Debt upon an Obligation, to perform an Award, and the Defendant pleads no Award made; the Plaintiff ſhews the Award which makes the Iſſue, yet he muſt add a Breach, which though it be not iſſuable, yet it is

Yelv. 24, 153. Accord. 2 Cro. 220, 221. ſo material a Form, that the Plaintiff hath no Cauſe of Action without it; and therefore cannot have Judgment without it: And therefore if it be omitted, and the Defendant demurr generally, I am of Opinion clearly, that he may take Benefit of it. And if in ſuch Omiſſion the Iſſue were taken Award or not, as it muſt be, and the Award found, yet the Plaintiff

Syd. 186. could have no Judgment, notwithſtanding the Statute of Jeoffails.

Note, the Words of the Stat. of Demurrers, the Right (viz. of Actions) muſt appear to the Court, otherwiſe in Caſe of meer Form, not of Subſtance to the Action. Now the Addition of Collation in this Caſe is but a Matter of Aggravation and Surpluſage; thus far it went before it was diſcovered, that the Preſentation and Refuſal was laid 29 Maii. And the Writ bearing Teſte 9 Maii, ſo as howſoever there was a general Diſturbance laid in the Declaration, yet the true Diſturbance, whereby the Plaintiff intended to maintain his Action, was done after the Action was brought. Whereupon I was and am of clear Opinion, that Judgment muſt needs be given againſt the Plaintiff: For Right and Wrong are the Mother of all Actions; and therefore no Action can be brought without laying a Wrong done before the Action, neither can there any full and perfect Recovery be had regularly without convicting the Defendant of a Wrong; I ſay, a full Recovery and Regularly, becauſe in ſome ſpecial Caſes, a Man may obtain the End of his Suit in ſome ſort without convicting the Defendant of a Wrong, but that muſt be in a ſpecial and regular Form, but never without a Wrong ſuppoſed: As for Example in this very Caſe.

The Plaintiff lays down his Title to the Advowſon, and the Avoidance, and the Diſturbance. If in this Caſe the Biſhop ſay, that he Claims nothing but as Ordinary, and demands Judgment, if without ſpecial Diſturbance, &c. Now the Plaintiff hath an Election either to take his Writ to the Biſhop, or to retain and proſecute his Action on a final Judgment; if he pray his Writ to the Biſhop, he ſhall have it to the ſame Biſhop, for it doth not appear to the Court that he was a Diſturber, neither ſhall the Biſhop be amerced, but the Plaintiff, pro falſo clamore.

This Form is proper to this Action and ſome few others (whereof I ſhall ſpeak) and the Form and Nature of this Action doth well bear this Proceeding; for the Writ being quod permittat ipſum præſentare, &c. Et unde eum impedit, &c. and the Defendant comes in, and ſaith in Effect, I ſuffer, and do not hinder you to preſent.

The Cauſe is at an End if the Plaintiff will, and he may pray and take the Effect of his Suit, which is Preſentation, and no Damage, becauſe the Defendant is not convicted of any Wrong.

But now if the Plaintiff will not accept that Reddition, but chooſe rather to make a full and final Recovery, then doth he (as in all other Caſes of Election) forſake and loſe the Benefit of the former, and ſtands to the hazard of the later, to have either a total Recovery, or a total Bar.

So that if he aſſign a ſpecial Diſturbance, and it be tried againſt him, he is to be barred. Like unto this, if a Man bring an Action of Debt upon an Obligation of 20 Pounds, for the Payment of 10 Pounds at a Day paſt, and

and the Defendant plead Tender at the Day, and uncore prieſt offering it in Court, the Plaintiff may accept it, and there is an End; but if he will proceed to a full Recovery of the Forfeiture, and deny the Tender, and that be found againſt him, all is loſt. So in Dower, if the Tenant plead that the Demandant detains Evidence, the Demandant delivering in the Evidence, may have Judgment maintenant. But if ſhe will deny the Detainer of the Evidence, and that be found againſt her, ſhe ſhall loſe her Dower. 1 Inſt. 207. a. 9 Co. 79. Peitoe's Caſe, Co. L. 207. a. Cr. Jac. 627.

So in the Caſe of Dower brought againſt a Guardian in Chivalry, who pleads the Detainer of the Heir his Ward. So in the Caſe of an Action of Debt brought againſt an Executor, who pleads Rien enter Mains, and indeed hath then nothing; yet the Plaintiff may have Judgment for his Debt, preſently to be had by ſci. fac. when Goods ſhall come to his Hands. 1 Syd. 448. Accord. 8 Co. 134. Accord. Et ſi Aſſets ſont trove ſolement al. part de Debt, Judgment p' intire Debt e bone, 1 Cro. 167. ſeius 1 Cro. 373. 1 Leo. 68. Swinb. 329. Ant. 18.

Shipley's Caſe, Co. lib. 8. 134. But if he will proceed to prove Aſſets preſently, and that be found againſt him, he ſhall be barred for ever, and yet there was a due Debt, and that in Effect confeſſed.

So in a Writ of Meſne, if the Defendant plead not diſtrained in his Default, the Plaintiff may have Judgment for his Acquittal preſently: But if he will proceed to prove that he was diſtrained in his Default, and fail, he ſhall be barred. So in a Warrantia Chartæ, &c. 8 Co. 134. a. 8 Co. 53. Co. L. 366. a.

Now then clearly to make a final Recovery in a Quare Impedit, you muſt prove unto the Court, or at leaſt make a ſufficient Allegation of a juſt Cauſe of Action, which is a Diſturbance by the Defendants, or one of them, before the Action brought, whereas in this Caſe it appears, that the Diſturbance, whereupon you would maintain your Action, was made after the Writ brought; and that which makes it the worſe againſt you is, that this appears of your own ſhewing, whereof it is regularly true, that if the Plaintiff will himſelf diſcover to the Court any thing, whereby it may appear that he had no Cauſe of Action when he commenced it, his Writ ſhall abate (as if he will demand a Debt, or diſtrain for a Rent before the Day of Payment) of his own ſhewing, it is againſt him. Yel. 71. Ben. 131. Palm. 524. 1 Cr. 573. 2 Cr. 70. 1 Ro. 792.

Nay more, if of his own ſhewing, though he had Cauſe of Action, yet it was in another manner, it will be againſt him. And therefore if four commit a Treſpaſs (which in its Nature is joint and ſeveral) yet if the Plaintiff will bring his Action againſt one only, and declare that he with the other three did the Treſpaſs, his Action ſhall abate; but if he had brought his Action againſt one alone, and the Defendant had pleaded that he with others did the Treſpaſs, and that the Plaintiff had releaſed to the other, and the Plaintiff deny the Releaſe, whereby he doth in a manner confeſs, that the other were joint Treſpaſſers, yet this Action ſhall not abate. But you ſaid, that the Plaintiff had laid a Diſturbance well in his Count, which is ſuppoſed true, and done before the Action brought, and that the Defendant had pleaded an inſufficient Bar to it, for he hath neither denied nor confeſſed, and avoided the Diſturbance laid; for, the Collation after the Writ is no Anſwer: And therefore, ſay you, Judgment ought to be given againſt the Defendant, which is true, if the Plaintiff had reſted upon the Bar, and demurred upon it. Ant. 164. 11 Co. 5. b. Cr. Car. 239. 1 Le. 41. Styl. 15. 3 Leon. 77.

But it is regularly true in Law, that if upon the whole Record it appear that the Plaintiff had no Cauſe of Action, and ſpecially of his own ſhewing, that the Court ſhall never give Judgment for him however the Defendant had miſdemeaned himſelf in his Pleading, for melior eſt conditio poſſidentis, and the Defendant is ſafe if the Aſſailant miſs him, for, vana eſt ſine viribus ira. Ridgwaye's Caſe, Co. lib. 3. 52. and Burton's Caſe, Coke lib. 5. 69. A. brings an Action of Debt upon an Obligation againſt B. who pleads, that it was upon Condition he ſhould perform the Award of two, and that they two and a third made no Award. This is nought. But if the Plaintiff do alledge Award by the two, or by the three, and alledge not alſo a Breach whereby it may appear to the Court that he had a Cauſe of Action, he ſhall never have Judgment. And yet it was not the chief Matter of his Plea, nor iſſuable, and the Declaration was full and perfect, but that was but 1 Saund. 285. Deut. 14. 8 Co. 120. b. 133. b. Accord. 2 Cro. 133, 221. 3 Co. 52. b. Co. 8. 133. b. Ant. 14, 128. 1 Cr. 300. Dy. 76. a. 1 Cr. 575. Yel. 152. Cr. Jac. 220

but the Beginning of a Plea, and the Court muſt judge of the whole, where-of the Declaration is but a kind of Surmiſe. But when the Defendant had pleaded in Bar, ſo that both Parties are heard in Part, then the Replication and other Pleading brings the whole Caſe to Maturity, and then the Court ſees the Truth of the whole Caſe, and not before.

Now to a Queſtion which hath been ſtirred, and is of good uſe for Learning, though it conclude not to the Judgment of the Caſe, I will ſpeak a Word.

Collation by a Biſhop by Lapſe incurred hanging the Suit.

Suppoſe the Caſe to be, that I have Right to preſent to an Advowſon, but I preſent not, nor am any way diſturbed, but the Church remains void and open to me, but before the ſix Months incurred, or before Collation made by the Ordinary, I bring a Quare Imped. againſt him, whether now the Ordinary be debarred of preſenting by Lapſe, hanging the Writ.

I am of Opinion that he is not debarred. And firſt, it were a Caſe full of Miſchief that the Ordinary, bearing himſelf never ſo juſtly and ſincerely, ſhould againſt Law and Reaſon be ſubject to cauſleſs Actions and Charges, and defrauded of his due Lapſe, and the Church kept void Eccleſia viduata by the Fraud of the Patron, by a fraudulent Action as long as he liſt. For, if he brought no Action, the Lapſe ſhould run, and now by bringing of a feigned Action he ſhall ſtop the Lapſe in the Ordinary, and by Conſequence it will not come to the Ordinary nor to the King; but now examine the Reaſon and the Authorities.

Can there be any thing more unreaſonable than that a Man ſhould make Benefit of an unjuſt Suit as the Plaintiff ſhould? Or be puniſhed doing nothing amiſs, or againſt his Office, as the Defendant ſhould?

But you will ſay to me, it is an Effect of Law, and executio juris non habet injuriam. For when the Biſhop comes in, he is charged by the Declaration with the Diſturbance, which if he do not avoid, he ſhall be taken as a Diſturber, and then indeed he cannot Collate, or his Collatee ſhall be removed. Therefore, if when he doth appear he doth but caſt an Eſſoin, though that do not make him a Diſturber to maintain the Writ, becauſe it is after the Writ, yet it faſtneth upon him the Charge of the Diſturbance laid in the Declaration, ſo that he ſhall not be received after they plead ne diſturba paſs, or the ordinary Plea which amounts to as much; for that Plea pretending Innocency, muſt (as all other the like Pleas) be offered the firſt Day upon the Appearance, for Delay makes him nocent, and ſo is oppoſitum in obje&to. Then again if the Ordinary plead his own Plea of Acquittal amounting to Ne diſturba pas, the Plaintiff may pray a Writ to the Biſhop, and ſo remove his Clerk, becauſe he comes in hanging the Writ, and thus it is a Dilemma made by Law, and not by fraud of the Party. And the Rule in the Reg. fo. 31. is ſo. That if the Dioceſan be named Defendant in the Quare Impedit he ſhall never preſent by Lapſe.

To this I anſwer, that if the Biſhop do not plead according to his Innocency, that the Proceeding ſhall be againſt him, and the Conſequence of it as againſt a Diſturber. But if he plead that he did not Diſturb, which is true, it ſhall be taken according to the Caſe, that he did not Diſturb before the Action brought, neither unlawfully nor by lawful Collation; but it can never be underſtood to deny or renounce any actual Collation ſince, for if he ſhould plead that, it were vain and to no Purpoſe (as it hath been ſaid.)

* Now then if he did not diſturb before the Writ purchaſed, and therefore hath not diſpoiled himſelf of his Right of Collation in his due time, and then collates by Lapſe Lawfully when his time comes, when the Patron hath wilfully, and without his Fault ſurceaſt his Time, and then pleads that he claims nothing, but as Ordinary, &c. without mentioning his Collation hanging the Writ, becauſe it is impertinent (as it hath been ſaid) neither indeed do I ſee how he can be received to plead it, no not by the way of ſaving it by Proteſtation, as upon Attornment to ſave Privilege of Waſte. But certainly it is not neceſſary, though upon ſuch Plea the Plaintiff may have a Writ to the Biſhop, he may perhaps be compellable to admit the Clerk of the Plaintiff in Obedience to the Writ, but yet it ſhall not work a Removal

* Note, that the Writ to the Biſhop in this Caſe ſhall not be with the Clauſe of *non obſtante reclamatione epiſcopi*, for he makes no Claim as in the Caſe of Diſturbers. Note, that the Ordinary's Plea neither makes the Patron's Title better, nor his own worſe, than are proper to them both, and as they were before, neither diſclaims his due.

removal of the Biſhop's Clerk, but he ſhall retain the Benefice, as having the better Right. Like unto the Caſe and Reaſon where A. brings a Quare Imped. againſt B. and hanging the Suit, a Stranger preſents, and his Clerk is inſtituted, &c. And then A. hath a Judgment againſt B. and a Writ to the Biſhop non obſtante reclamatione B. the Biſhop ſhall receive the Clerk of A. without diſputing the Right of A and C. but yet if C. have better Right to the Patronage, his Clerk ſhall retain the Benefice, and ſo e converſo. 6 Co. 52. Cr. Jac. 93. Co. L. 344. b.

* But now I put another Caſe. If my Church become void, and I preſent to the Biſhop, and ſo alſo doth another that hath no Right, in which Caſe the Biſhop, though he may receive at his Peril, yet doth (as he may Lawfully do) refuſe to receive either 'till the Right be inquired, without doing himſelf any Act of Diſturbance; in this Caſe, if the the true Patron do bring his Quare Imped. againſt the Diſturber only, then the Biſhop may collate by Lapſe without Queſtion. But in that Caſe if the true Patron name the Ordinary a Defendant, together with the Diſturber, and then the Biſhop come in and plead that he claims nothing but as Ordinary, &c. and then the Plaintiff hath an Award of a Writ to the Biſhop, with a ceſſet executio, &c. and then recovers againſt the Diſturber, and the Biſhop in the mean time collates by Lapſe; in that Caſe perhaps the Biſhops Clerk may be removed, for it differs much from the former Caſe; for here was a true and not a feigned Diſturbance, whereunto the Ordinary gave way ſo far, that the Plaintiff could not get his Clerk received, but was driven to his Quare Imped. for if he had proceeded to his Jure patronatus without Quare Imped. and the Time had incurred, the Biſhop might have preſented to lapſe Remedileſs: And therefore ſince he did his Endeavour to preſent, and was interupted by a Stranger, and the Ordinary alſo refuſed his Clerk, for which he had rather have an Excuſe than a Juſtification, and now both being made Defendants, and the Plaintiff's Title is proved againſt them both, as if it had been ſo from the Beginning, it ſhould be hard that the Biſhop ſhould make Advantage of his Refuſal, which now appears to have been againſt Right, and the Party to the Suit.

* Note, that it is not ſo much the Preſentation of the Diſturber, as the Biſhop's Refuſal of the Patrons Clerk that Preſents, which intitles him to the *Quare Impedit.* And therefore it is enough for a Biſhop to eſcape the Charge of a Diſturber, and not alſo to make Advantage of a Lapſe cauſed by himſelf. Mo. 572. Poſt. 317. Co. L. 344. b. 6 Co. 52. a. p. 320.

IN the Caſe of one Lacy a Will was ſentenced in the Star-chamber; and now he againſt whom the Sentence paſſed exhibited a new Bill of Perjury againſt the Witneſſes, ſuppoſing that their Teſtimonies were Falſe and Corrupt, whereupon the Sentence paſſed; the Defendant thereupon demurred in Law, and this Demurrer was referred to Montague Chief Juſtice, who reported, that the Defendant ought to anſwer. Note this Caſe and ſee it: And,

Sentence given grounded upon the Witneſſes, which are after ſued there for Perjury.

Anno quinto Jac. between Jarvous and North, an Information charging the Witneſſes in a former Suit ſentenced, to have been ſuborned and perjured, was allowed. Note, this is a legal and judicial Proceeding which allows the Sentence to be juſt according to the Proofs, and impeaches the Proofs, which (if it ſhould not be allowed) Perjury ſhould receive Warrant in a Court of Juſtice, and by the Sentence of it, whoſe Office it is to puniſh it; but yet if the Perſon ſentenced will ſpeak Voluntary to the ſame Effect, that the Sentence was juſt, but it was grounded upon falſe Teſtimony, the Court doth puniſh it commonly; for that is a cunning ſcandalizing of the Sentence, and hath neither Purpoſe nor Protection of a Legal proceeding. Yet this Caſe is of dangerous Conſequence, for if it appear that the Teſtimonies whereupon the firſt Sentence was grounded, were Falſe, and a ſecond Sentence pronounce ſo, though this taint not the Judges, yet the Sentence is in a ſort falſified and ought not to grieve the Party.

(252) Balden *verſus* Temple. Debt.

Eſcape out of Execution. Br. Eſcape. 45. Dy. 67. 3 Co. 43, 44.

BAlden brought an Action of Debt againſt Sir Thomas Temple late Sheriff of Buckingham, for an Eſcape of one Cockman his Priſoner in Execution, and upon Iſſue nihil debet, the Evidence before me at Guild-hall London was this, that one Shortſebury Goaler to Sir Thomas Temple, having the ſaid Priſoner in Execution, in his Goal at Alisbury, ſuffered him to walk abroad in the ſaid Town, yet for the moſt part with a Keeper, whereupon I directed the Jury, and ſo they found againſt the Defendant as an Eſcape, for though the Sheriff may remove his Goal from one Place to another within his Bayliwick, yet he muſt keep it and his Priſoners within it, and not ſuffer them to go at large out out of the Priſon, though himſelf be attending on him, without an Habeas Corpus from ſome Court of Juſtice. And let Keepers of Priſons beware when they receive an Habeas Corpus from the Chancery, or any other Court bearing Teſte in the End of a Term, to have the Body of one in Execution, in the Court the next Term, that they do not by Colour of ſuch Writs ſuffer the Party to go at large all the mean Time (as is ſometimes practiſed) for, the Writ warrants no more but that he be brought out of Priſon only for that Purpoſe, and only for ſo much Time, as in Judgment of Law ſhall be convenient and neceſſary for the Execution of the Writ, and no more, which in privilegiis ad oſis muſt ever be ſtrict.

Plo. 35. b. 1 Cro. 14. 210, 460. Herl. 34. 3 Cr. 5. 1 Ro. 808.

(253) Sheriff of Eſſex his Caſe. Debt.

1 Ro. 901, 902. Br. Eſcape, 45. Plo. 36. a. Dy. 67. a. 3 Co. 52. b. 1 Le. 119. 1 Cr. 240, 255. 2 Cr. 659. Syd. 330. Ant. 60.

"BEfore me at Guild-hall upon an Action of Debt againſt the Sheriff of "Eſſex, upon an Eſcape, it fell out thus upon Evidence, that the Priſoner having been in Execution, was willingly let go out of Priſon by the "Goaler, and then came into the Goal again, and ſo remained in the Goal "'till the Time of another Sheriff, and then eſcaped; whereupon this Action "was now brought." And I directed, that this Sheriff was not anſwerable to this Action; for when the Priſoner was let to go abroad Voluntarily by the Goaler, the Execution was utterly diſcharged, ſo as he could not Lawfully be taken again, nor judged in Execution by Law, though the Party would yield himſelf unto it, or the Creditor ſo allo whim. And therefore the next Sheriff cannot be chargeable with him, nor anſwerable for him, as in Execution, neither can two Sheriffs be anſwerable ſimul & ſemel for two Eſcapes out of one and the ſame Execution at the ſame Time.

2 Cro. 659.

(254)

1 Le. 3. Br. Eſcape, 45.

AND at the ſame Time another Trial fell out thus. That upon a Capias ad ſatisfac. one was taken in Execution by the Under-Sheriff, who took Money of him for the Execution, and let him go, and this he concealed from the Plaintiff, and then the Sheriff dieth; a new Sheriff being made, the ſame that was Under-Sheriff before became Under-Sheriff to him alſo, and procureth the Plaintiff to take out a new Capias ad ſatisfac. againſt the Party, upon which he was arreſted again, and eſcaped. And I directed likewiſe, that the new Sheriff was not anſwerable to this Action, becauſe the ſecond Taking in Execution was never lawful.

8 Co. 142. a. 2 Cro. 3. 2 Leo. 84, 85. 3 Cro. 164, 165, 188, 576. utra. Yelv. 42. Semble Caſe. Plo. 36. a. 3 Co. 25. b.

(255) Mannering & Uxor *verſus* Dennis.

1 Roll. 381.

SIr Arthur Mannering and his Wife, one of the Daughters and Co-heirs of Sir Thomas Dennis of Devonſhire, exhibited a Bill in Chancery againſt Gabriel Dennis; and the Effect of the Bill was this, that Sir Robert Dennis, Father of Sir Thomas, in the 18 Year of the Queen, had conveyed the Subſtance of his whole Inheritance to the ſaid Sir Thomas for Term of his Life, and ſo on, and for Default of Iſſue Male of him, and another Brother of his, the Land was limited to the Father of Gabriel, and the Heirs Males of his Body, and added a Proviſo, giving him Power to make a Revocation by his Writing under his Hand and Seal, in the Preſence of two credible

credible Witneſſes, &c. in ordinary Form, and alledged, that he had made ſuch a Revocation, and that the Writing was extant, and therefore prayed Proceſs. The Defendant denied the Revocation, and ſo that was the meer Iſſue, whether there were a Revocation or not, which Gabriel Dennis labour-ed by all Means to bring to Trial at the Common Law; but was holden un-der Injunction, 'till by an Accident he got a Slip by the Death of the Party out of the Injunction, and had a Trial by Ejectione firmæ againſt Sir Henry Rawle, that had married the other Daughter and Heir, and had a Verdict againſt him upon that very Point, and had Judgment and Execution of the Manor of yet the Lord Chancellor renewed his Injunction for all the Reſt, and preſſed to Examination of Witneſſes, and ſo the Cauſe was heard divers Days before him and me, and Baron Altham, whom he called to his Aſſiſtance; but he never came to conſult with us what to do upon the Hear-ing, but died. And then Sir Francis Bacon being made Lord-Keeper, he called me to his Aſſiſtance again, Baron Altham being Dead, and then Que-ſtion was made by a former Order of his, Whether this Caſe were a Caſe examinable in Chancery? And it was reſolved by him, the Maſter of the Rolls, and my ſelf, that this Cauſe was not fit for that Court, but for the Common Law, except all Cauſes that were triable naturally by the Com-mon Law, and by Jury, ſhould be made examinable, and determinable in Chancery per teſtes, which were to confound Juriſdictions, and to make the Common Law, and all the Courſe of it needleſs, and a Handmaid to the Chancery, and to take ſuch Cauſes as it pleaſeth them to leave; and ſo this Cauſe, after ſo long and tedious Suit in Chancery, was abſolutely diſmiſt.

Cauſes Improper for the Court of Chan-cery.

(256) Cavendiſh *verſus* Worſley.

Sir Charles Cavendiſh exhibited a Bill in Chancery againſt Worſley, and died, and his two Sons, Sir William Cavendiſh, and another, did like-wiſe exhibit a Bill of Revivor againſt him, and the Caſe came to this, that the Grandfather of Worſley, being Tenant for Term of Life, the Remainder to the Father in Tail, the Grandfather levied a Fine of the Land Threeſcore Years paſt to and the Father alſo conveyed the Land by Bar-gain and Sale, and ſo it came by mean Conveyances to Sir Charles Caven-diſh; and in this Caſe alſo the Lord-Keeper called me to his Aſſiſtance, and we reſolved, that Cavendiſh could have no Relief in this Cauſe in this Court, becauſe by Statute, Tenant in Tail is diſabled to barr or bind his Iſſues, but by ſuch Means as the Laws and Statutes have allowed.

Chancery cannot re-lieve againſt a Statute Law. Chan. R. 228.

(257) Swaine *verſus* Holman & Uxor.
Tr. 14 Jac. Rot. 755.

Richard Swaine Eſquire, brought an Action of Waſte againſt Thomas Hol-man, and Eliz. his Wife, of certain Mills in Sturminſter, and declared of a Leaſe thereof, made by Queen Elizabeth, unto the ſaid Elizabeth the De-fendant, when ſhe was ſole, in the 8 Year of her Reign, and that the King granted the Reverſion unto him, and then ſhews the Waſte. The Defen-dants plead, that they being ſeiſed in the Right of Elizabeth of the ſaid E-ſtate, they did, in the 40 Year of the Queen, at Weſtminſter, ſurrender tam totum jus, Statum, titul. & intereſſe ipſius Eliz. quam. lit. Patentes, &c. & ſuper inde the Queen afterwards eodem An. 40. reciting the Demiſe and the Surrender (as aforeſaid) in Conſideration of the ſame Surrender did Demiſe the ſame Mills unto the ſaid Elizabeth Holman, and two of her Sons; the Plaintiff main-tained his Declaration, and traverſed abſque hoc, that the Defendants did Surrender tam totum ſtatum, jus & intereſſe ipſius Eliz. prout, &c.

Whereupon Iſſue was taken and tried before me in Middleſex, and the Jury found, that the Defendant being ſeiſed in the Right of Elizabeth the Wife, for Term of her Life by the firſt Letters Patents, the Queen by the other

Dorſet. Brownlow. Conſideration in the King's Court, of a former Leaſe to a Wo-man Covert for her ſelf ſurrendred. Hutt. 7. Meſme Caſe. Co. L. 309. b. Ant. 179. 2 Ro. 199.

other ſaid Letters Patents did demiſe the ſaid mentioned Mills to the ſaid Elizabeth, and to her ſaid Sons, Humfrey and Roger Holman, one after another for Life, and then find the ſaid ſecond Letters Patents, with Recital of the former Eſtate of Elizabeth, and that ſhe had ſurrendred totum jus, &c. (as before) and in Conſideration of the ſaid Surrender did demiſe the ſame of new to her, and her ſaid two Sons, one after another prout; and they find, that the ſaid ſecond Demiſe was made and had with the Aſſent of the ſaid Holman her Husband, and that he payed the Fine of 20 Nobles mentioned in the ſaid Letters Patents, and that both the Defendants did agree, and Claim by the latter Demiſe & ſi &c. Whereupon after ſome Argument, Judgment was given for the Plaintiff, whereof the Serjeants principally made this Reaſon, that the Husband could not be ſaid to ſurrender to the Queen but by Record, whereas his Aſſent was not of Record, but was a Thing dehors as it was found by the Jury. Juſtice Hutton held, that as it was put in Iſſue, it muſt be underſtood of an actual Surrender, whereas this was but a Surrender in Law at the moſt.

Judgment.

Mo. 415. 1 Co. 83. Poſt. 223.

But that that moved [me] principally was this, that the Iſſue did import, and ſo the Queen in her Recital and Conſideration doth expreſs and conceive, that the whole Eſtate of Elizabeth was ſurrendred, that is, totally ſurrendred and extinct, ſo as it ſhould be in her abſolute Power to make a new Demiſe perfect and permanent; whereas here, if the ſecond Leaſe had been made to the Husband and Wife both, as it was but to her alone, yet upon his Death, ſhe might have claimed again by her old Term.

Mo. 637.

Co. L. 44. b. Hutt. 8. 5 Co. 93. b.

And therefore, if the King would make the like Recital, and Conſideration of a Surrender of totum ſtatum, and the Surrender indeed was upon Condition revocable, the new Eſtate would be void, as in Deceit of the King, like the Caſe upon the Statute of 32 H. 8. of Leaſes, a Surrender Conditional will not be within the Law to make good a new Leaſe. And ſee Barwick's Caſe, where a pretended void Leaſe was ſurrendred to the Queen, and ſhe, in Conſideration of the Surrender of the Letters Patents, and of the State that he held by them, made a new Leaſe, and it was adjudged void, not becauſe it was untrue in Word, but becauſe it was untrue in Effect, the Queen meaning to take in ſuch an Eſtate as was in Shew.

5 Co. 94. a.

But I am of Opinion, that if the King make a new Leaſe to his preſent Leſſee, in Conſideration of the ſame Surrender of the Former, that this will be clearly good, by the Surrender in Law. And if a Man will deny the Surrender he may demur in Law upon it, becauſe it appears to the Court, that the Acceptance of a new Leaſe is a Surrender of the Old. And if an Eſtate be made to a Man's Wife de novo, it is not neceſſary to averr his Aſſent, for it veſts 'till he diſſent; but in this Caſe an Aſſent is neceſſary, becauſe the Wife had an Eſtate before, which cannot be diveſted, but by his Aſſent to the latter Eſtate.

10 Co. 67. a. 3 Cr. 32

1 Inſt. 3. a

(258) Pie *verſus* Lovell.
Mich. 15 Jac. Rot. 658.

Hill. *Decimo quinto* Jac. Information for Recuſancy in the Common Pleas.

Pie the Informer had a Verdict for the King and himſelf, againſt Sir Francis Lovell, by Information in the Common Pleas, for two Hundred and Twenty Pounds, for Eleven Months Abſence from the Church. Now in Arreſt of Judgment Athow moved, that the Information lay not in the Common Pleas, but was by the expreſs Letters in the Stat. 28 Eliz. reſtrained to the King's Bench only, with an expreſs Negative, and not elſewhere.

29 Eliz. c. 6.

Co. 11. 61. 2. Foſter's Caſe.

This Exception took life from a Conceit of Sir Edward Coke's in Foſter's Caſe, lib. 11. where, after ſome Things reſolved, he ſays, that it was well obſerved, but doth not ſay by whom (but I take it by himſelf) that the Stat. 28 Eliz. had reſtrained the Informer only to the King's Bench, and ſo he doth both exclude the Common Pleas, and Exchequer. Hereupon the Court took Time, and ſpake publickly in it, Hutton, Warburton, and my ſelf, (Winch being then ſick) and we all agreed clearly, that the Information did well lie in the Common Pleas, and that the contrary Opinion was an Error, ſpringing out of the common miſtaking of a Law by cleaving too much to the

4 Le. 8.

the Word, and not obſerving the Intent and Meaning of the Law. For firſt it is clear, that the Statute 23 Eliz. gives the Remedies upon Recuſancy, one for the Queen alone by Indictment (and that Coke confeſſeth in the ſame Caſe) and that appears by the Clauſe that admits Submiſſion before Judgment, or upon Arraignment before Juſtices of Oyer and Terminer of Aſſize, and Goal-delivery, and before Juſtices of Peace; the other is by Action of Debt, Plaint, Bill or Information in any Court of Record, for the Queen, the Informer and Poor; ſo here it is clear, that the Informer is enabled in the Courts by that Stat. now the Stat. of 28 Eliz. was made only for the Benefit of the Queen in the proper Suits by Indictment, and that Coke himſelf in Foſter's Caſe, fol. 60. confeſſeth was reſolved, and therefore the Word (Indictment) is found almoſt in every Clauſe of that Stat. and that the Statute was made only for the Queen, and for her Indictments. Obſerve all the Clauſes. Firſt, fraudulent Conveyances are made void, as againſt the Queen. Secondly, that all Convictions ſhall be certified into the Exchequer, to make Proceſs for the Queen. Thirdly, then follows the Clauſe, that every Conviction hereafter ſhall be in the King's Bench, or the Aſſize of Goal-delivery, and not elſewhere. The Meaning of which Clauſe is, that the Indictments for the Queen her ſelf ſhall be there, and not before Juſtices of Peace, as by 23 Eliz. it muſt be; which was the Reaſon of the Negative (not elſewhere.) And note, that this Clauſe did not give unto the Queen any new Form of Conviction by Action of Debt, or Information for her ſelf alone, for afterwards the Stat. 23 Eliz. was made for that Purpoſe. Then the fourth Clauſe is, that every Recuſant before convicted generally ſhall without any other Indictment, which ſhews plainly, that all reſpected Indictments, and Convictions thereupon, and ſo 5, 6, & 7 Clauſes. And laſtly, the eighth Clauſe, which gives the new Form of Conviction, by Indictment and Proclamation. Neither is it probable, that the Laws that were ſharped, and added from Time, ſhould purpoſe to ſhorten, or diminiſh the Means of puniſhing the Recuſant; and the Practice hath been always againſt it. And Coke himſelf in that Caſe confeſſeth, fol. that the Informer may ſue in the King's Bench ſtill, and that by Force of the Statute 23. as he might before. Now it is clear, that if a Man at the making of 28 had been convicted of Recuſancy, by any other Means than by Indictment, he had not been bound by that Law to pay the 20 Shillings a Month from the Conviction, and if a Man be now convicted in the King's Bench by Indictment, or otherwiſe, he cannot be proclaimed, nor otherwiſe his Penalty run on, for it is not within the 8 Clauſe of that Law of Conviction by Proclamation.

(259) Waterer *verſus* Freeman.
Mich. 15 Jac. Rot. 1941.

Midd. Action upon the Caſe for double Execution ſued. 1 Roll. 34. 103. Brownl. 1. R. 12. Noy. 23.

WAterer brought an Action of the Caſe againſt Freeman, and declared, that the Defendant had ſued out at Weſtm. a Fieri fac. upon a Judgment given againſt him for the Defendant, for a Treſpaſs in Oxfordſhire, in the King's Bench to the Sheriffs of Oxfordſhire, who by vertue thereof, took Goods of the Plaintiff to the Value of the Damage, and ſo made his Return, and that the Goods remained in his Hands pro defectu emptoris, and that the Defendant well knowing this (to the Intent to vex and double charge him) afterwards did ſue out another Fieri fac. to the ſame Sheriff, and delivered it to him to be executed, who did thereupon levy the Money of other Goods of the Plaintiff and paid it over to the Defendant, whereby the now Plaintiff was double charged; whereupon the Defendant pleaded not Guilty, and it was found againſt him.

2. *Fieri fac.* executed upon one Judgment.

Now Harris moved in Arreſt of Judgment, that the Action would not lie, being for a legal Suit, by the Party intereſſed himſelf, though the Cauſe of Action were falſe, and ſo known to the Party himſelf, and cited to his Purpoſe 2 R. 3. 5. 9. 5 E. 4. 126. & 21 E. 4. 22. Chibborn argued to the Contrary, and cited Gerard and Dickenſon, Col. 4. that it is Actionable if I pretend a Title to another Man's Land, though it be for my ſelf, if I know it certainly

3 Cro. 836.

tainly to be false, also he cited M. 43 & 44 Eliz. Bray versus Partrige in B. le Roy Action upon the Case, for suing in the Spiritual Court for Tythes, against a Composition made by himself. And a like M. 4 Jac. by the Lady Waterhouse against Moodie for a Suit in the Spiritual Court for Tythes of Trees not Tythable.) * But note, that Gerard's Case is not of a Suit in Court, but of idle Speech, and other two Cases are of Suits Coram non Judice, and so no legal nor just Suits in Effect. See 8 E. 4. the like in Form as Buckley and Wood's Case, if one by Bill in the Star-Chamber, will charge another with Piracy, or Felony, and both Plaintiff and Defendant are punished by Ordinance of Law by Amerciament, as well for false Defence, as false Complaint. And by like Reason, he that should defend a Suit unjustly against his Knowledge, should be subject to an Action of the Case. Vide Residuum infra. 266.

2 Cro. 133, 134.

* But *Quære* for Moodie himself tells me, that he suing for Tythes as a Farmer of the Parsonage of Woodchurch in Kent, such an Action upon the Case was brought, whereupon he demurred, and the Court misliked the Action, and so it rested without any farther proceeding. 4 Co. 14. b. 2 Cr. 671.

(260) Speake *versus* Richards. Debt.
Tr. 15 Jac. Rot. 1968.

Midd. Brownl. Debt against a Sheriff for Money taken in Execution, and not answered. 2 Cro. 540. Hutt. 11. Noy. 22. 2 Cro. 566. 2 Ro. 410, 427. Mesme Case. Moor f. 886. Brownl. 1. R. 51. 181. Winch. Ent. 304, 305. Noy. 24

HUgh Speake brought an Action of Debt of 523 Pounds 17 Shillings against Edward Richards, late High Sheriff of the County of Southampton, and declared, that one Paramour and others were bound by Recognizance in Chancery in 2000 Pounds to the Plaintiff, and that after other Process and Judgment 10 Julii 14 Jac. the Plaintiff sued a Levari fac. to the Defendant, returnable 15 Mich. which was delivered 1 Aug. whereupon the Defendant levied the Sum, and at the Day returned that he had levied the same Sum, Quos paratos habeo, and yet did not deliver it in Court, per quod, &c. The Defendant quoad 308 pleaded nihil debet, whereupon the Plaintiff took Issue, and as to the Rest he pleads, that after the issuing of the Writ, and before the Return, scil. 311 Aug. he did pay unto the Plaintiff the same Sum, whereupon the Plaintiff, by his Acquittance the same Day reciting that he had received it, did acquit him of it; whereupon the Plaintiff demurred in Law.

Cr. Car. 297. Hutt. 32. Accord. 539. Jon. 4302. Cro. 687. 1 Binl. 51. Det. Br. 178.

The first Question in this Case was, whether the Action of Debt would lie, because there was no Contract between the Plaintiff and the Sheriff. But that was resolved by the Court that it would lie; for though there were no actual Contract, yet there was a kind of Contract in Law, so it is ex quasi contractu. And therefore upon Damages recovered in an Action of Trespass, the Plaintiff shall have an Action of Debt; and by the same Reason when the Money is levied by the Sheriff, so as the Action ceaseth against the Defendant, the same Action is ipso facto by Law transferred to the Sheriff, having both the Judgment to make it a Debt, as before, and the Levy to make him Answerable, like unto the Case of 1 H. 7. of a Tally delivered to the Customer, as soon as Money comes into his Hands he is made a Debtor. Quære, if an Action of Debt may not be had against the Executor as a principal Debtor, declaring of a Devastavit by him. Debt lies by Corporations for the Penalties forfeited upon their Laws, so for Amerciaments in the Court Barons, so 11 H. 7. 14. for 3 Pounds Forfeiture, upon a Custom for Pound-Breach, & 34 H. 6. 36. & 9 E. 4. 50. It is holden that upon such Levies by the Sheriff, appearing upon Record, the Court may award a Distringas, or the Party may have a Fieri fac. or Elegit against the Sheriff to levy as much of his own, see Mich. 8 H. 8. Reports, Crooke 187. O. N. in the Exchequer, makes the Sheriff Debtor to the King, and the Debtor himself Debtor to the Sheriff. And though an Action of Account will lie properly in this Case, yet the same Case will many times bear both Actions, though the Money be received per auter mains, or the like. But then the Action of Account is necessary, when the first Receipt ab initio was directed to a Merchandizing, which makes Uncertainty of the neat Remain 'till Account finished; or where a Man is charged as Bayliff of a Manor, or the like, whereupon the Certainty of his Receipt appears not 'till Account; yet even in the Case of Merchandizing an Action of Debt will lie for

1 Cr. 540.

8 Co. 41. b. 11 Co. 45. a. Palm. 280. Syd. 397.

2 Cro. 515.

foꝛ the Summ receivꝛd beforꝛe the Merchandize, p'a and after the Merchandize, foꝛ ſo much as he hath not ſo imploꝛed; and therefoꝛe if I deliver an 100 Pounds to one to buy Cattle, and if he beſtow 50 Pounds of it in Cattle, and I bꝛing an Action of Debt foꝛ all, I ſhall be barꝛed in that Action foꝛ the Money beſtowed, and Charges, &c. but foꝛ the reſt I ſhall recover. Dy. 22. a. 2 Cr. 687. Yel. 24.

Another Point was urged foꝛ the Plaintiff, that the Defendant's Plea to the 308, lib. nihil debet was nought, becauſe it was direcly Contrary to his Return of Recoꝛd; but that was anſwered, that ſince they have not relied upon the Eſtoppel, but taken Iſſue, that could give him no Advantage. Eſtoppel requires a Relier. Pal. 182.

A third Point was urged foꝛ the Plaintiff, that ſince the Defendant by his Return made 15 Mich. had charged himſelf with the whole Money parat' then to be delivered to the Plaintiff, he cannot now ſay, that it was paid and acquitted beforꝛe.

Alſo beforꝛe the Return of the Wꝛit, he was not Debtoꝛ to the Plaintiff, and therefore a Releaſe to him was void; ſo upon Indictment bꝛy Conſpiracy Releaſe beforꝛe Acquittal will be void. But this the Court adjudged foꝛ the Defendant, foꝛ as ſoon as the Money was received bꝛy the Sheriff he was pꝛeſently Debtoꝛ to the Plaintiff, and releaſable, and ſince he hath bꝛy his Demurrer confeſſed his Acquittance, the Court can never give Judgment foꝛ him upon Pꝛetence of this Eſtoppel. Releaſe to the Sheriff by the Plaintiff after the Debt is levied is good. Poſt. 267. Jones 430. Mo. 468. March 13.

But now I move a Queſtion, if a Sheriff having a Fieri facias oꝛ Capias ad ſatisfaciendum pay the Plaintiff his Money of his own, whether he may now levy the Money of the Defendant after. Plowd. 187. b.

(261) Cranley *verſus* Kingſwell. Replevin.
Paſch. 15 Jac. Rot. 710.

CRanley bꝛought a Replevin againſt Kingſwell foꝛ taking his Cow at Liſſ. in quodam loco, &c. the Defendant avowed becauſe that Place (inter alia) was holden of him as of his Manoꝛ of Liſſ. bꝛy 20 Shillings Rent at Mich. and our Lady-day, and becauſe Ten Shillings was behind at our Lady Ann. 14. he diſtrained; the Plaintiff making himſelf Tenant to the Land pleads, that the ſame Lady-day he was beforꝛe Sun-ſet, and ſo continued, &c. upon Part of the Land ſo holden, and offered to pay the Rent to the Defendant, but neither he, nor any Bodꝛy foꝛ him, was there to receive it, and that it was never after demanded of him. The Defendant rejoins, that after the ſame Feaſt, and beforꝛe the Diſtreſs, he did demand the Rent at a Part of the Land ſo holden, and that becauſe it was not paid, he diſtrained. Southampton. Brownlow. Rent Service tendred at the Day of Payment, upon the Land, yet the Lord may Diſtrain without a Perſonal Demand. Hutt. 13. Meſme Caſe. Ro. 2. 427. Brnl. 181. Noy. 22. 8 Co. L. 202. a. Winch. Ent. 1032. Mo. 883.

Whereupon the Plaintiff demurred in Law, and Judgment was given foꝛ the Avowant. Foꝛ it was clear, firſt, that the Rent remains due ſtill, and the Rent is not a Dutꝛy Perſonal, as is a Homage which muſt be demanded of the Perſon. Alſo, the Tender is not material in this Caſe, becauſe the Demand muſt pꝛoceed, and the Iſſue muſt be taken upon that; foꝛ, if there be no Demand there can be no Damage required.

Now the Diſtreſs is both a Demand and a Diſtreſs, and if the Tenant be there and offer the Rent, he may not Diſtrain, and therefoꝛe the Rent being due, and the Land anſwerable, he may demand it when he will at the Land. But where a Penaltꝛy oꝛ Re-entrꝛy is joined to the thing, there you cannot take Advantage of the Pain oꝛ Foꝛfeiture, without a Demand at the verꝛy Time pꝛeſixt. And the Miſchief were great, foꝛ bꝛy this Conceit, if the Loꝛd did not demand his Rent at the verꝛy Dayꝛ, he ſhould never Diſtrain after, without an actual Demand of the Perſon of his Tenant. But if the Tenant tender his Rent at the Dayꝛ, oꝛ after to the Perſon of his Loꝛd, and he refuſe it, I am of Opinion, that he ſhall not after diſtrain without a Demand of the Perſon of his Tenant, But the Caſe of a Rent ſeck Maunds Caſe, Coke lib. 7. 29. differs, foꝛ there if the Rent be not demanded at the Dayꝛ, it muſt after be demanded of the Perſon, foꝛ there is no Remedꝛy foꝛ that Rent, but an Aſſize. Now a Diſſeiſoꝛ, a Man cannot be, noꝛ Damages laid upon him without a wilful Fault. Hutt. 23. Co. L. 144. a. 7 Co. 28. b. Ant. 82, 133. Poſt. 208. Hutt. 114. 2 Cr. 618. Co. L. 144. a. 153. b. Ro. 2. Ab. 428.

Browne

Replevin. (262) Browne *verſus* Dunnery.

Tr. 15 Jac. Rot.

Waller.
Glouc.
Rent granted with a Diſtreſs, *ſi legitime petatur*, requires not an actual Demand.
1 Brnl. 171. Hutt. 23. Mo. 887. Entre congeable, Br. 2. Ant. 82, 133, 135, 201. po. 331.

BRowne Plaintiff againſt Dunnery, for taking his Cows, firſt Sept. 14 Jac. at Old Sudbury; the Defendant makes Cognizance as Bayliff to Margaret Waller, Adminiſtratrix of Robert Waller, and ſhews, that one Warner was ſeized of the Land, and granted a Rent of 6 Pounds out of it to the ſame Robert Waller and Margaret, for the Life of Margaret, payable at Michaelmas and our Lady-day, or within Ten Days after. And further granted, that if the Rent ſhould be behind by the Space of 10 Days after any of the Feaſts exiſten' legitime petit', that then he ſhould forfeit 10 by way of Pain. Et quod tunc & totius, it ſhould be Lawful for Waller and his Wife, to diſtrain and detain until the ſaid Rent and Pain ſhould be ſatisfied. And then ſhews, that 54 Pounds, for 9 whole Years in the Life of Robert Waller, ended at the Feaſt of Saint Michael, Ann. 13. were unpaid, and that therefore he diſtrained for them, being ſo behind. The Plaintiff denied the Seiſin of Warner, which was found for the Defendant.

Co. L. 351. a. 3 Cr. 791. Ben. 159.

Now in Arreſt of Judgment it was excepted, that the Rent incurred in the Life of Waller did not belong to her, as Adminiſtratrix, but as in her own Right.

To which it was anſwered, that ſhe might wave the Grant to her ſelf. But that Anſwer would not ſerve, for then ſhe muſt have pleaded ſo as to bring her ſelf within the Stat. of 32 H. 8. to diſtrain for Arrearages after the Eſtate ended. But I gave another Anſwer, that ſince it appears, that ſhe might diſtrain in her own Right, and not as Adminiſtratrix, the Cognizance might ſtand well as her Bailiff, and the reſt Surpluſage and void.

Co. L. 144, 262. b.

Latch. 121.

Surpluſage in Plea.

Another Exception was, that the nine Years Rent could not be due at Michaelmas, becauſe of the 10 Days given. But that was anſwered, that it is averred, that the whole Rent was behind at the Time of the Diſtreſs, which was long after.

Demand of Pain, when it ſhall be. Hutt. 23. Co. L. 202. a.

But the great Exception was, that it was not averred, that the Rent was demanded before the Diſtreſs (as they ſay it ought to be by the expreſs Clauſe.) Whereupon theſe Things muſt be agreed clearly, that the Clauſe of Diſtreſs is no otherwiſe to be extended then as the Granter gives it; and therefore if the Clauſe were, if the Rent be behind, being demanded at another Place beſides the Land, or of his Perſon, then he may diſtrain clearly, then he could not diſtrain without ſuch a Demand made firſt, for there the Demand is other than the Law requires. But where the Clauſe is no more, but if the Rent be behind being lawfully demanded, then he may Diſtrain, it is no more than the Law ſpeaks; and therefore the Diſtreſs implying a Demand and Diſtreſs, one before another, by Operation of Law, ſatisfies it. And ſo here it was adjudged for the Defendant. But if he would have diſtrained for the Pain, he muſt have made his Demand actually of the Rent at the End of the 10 Days, for then that grew due. And I am of Opinion, that he muſt have made another Demand of the Pain it ſelf, (Quere for the Diſtreſs will ſerve for demand of that) which muſt be after that is grown due, which is not 'till the 10 Days be incurred; ſo that is not 'till the Eleventh Day, in the End of which Day I hold he muſt demand it, for the whole Day is given to the Payer without Fraction; and though the Clauſe of Diſtreſs be not ſeveral, one for Rent, another for the Pain, but as it were joint for both, ſo as literally taken, there could be no Diſtreſs for the Rent except there were alſo a Pain forfeited, and Diſtreſs for both; yet the Law will divide them, and diſtinguiſh their Demands according to their Natures.

Hutt. 114. March. 147. 4 Co. 73. a. Cr. Car. 407. 2 Ro. R. 264. 2 Cro. 618. 2 R. 467. Mo. 883.

Ant. 207. 7 Co. 28. b.

Madon

(263) Madox *verſus* Young. Debt.

MAdox brought an Action of Debt againſt Young late Sheriff of Berkſhire, upon a Judgment of Threeſcore Pounds recovered againſt one Gouge, whereupon he was taken in Execution by Capias utlagatum, within the Year, and eſcaped. The Defendant pleaded nul tiel Record of the Recovery; the Plaintiff demurred, conceiving that he ſhould plead nihil debet. But Judgment was given for the Defendant. For the Defendant may in Debt upon an Eſcape, plead nul tiel Record.

Eſcape out of Execution for Debt, upon it the Defendant may plead *Nul tiel* Record. Brownl. 1. R. 51. Ante. 179. 8 Co. 142. b

(264) Parkhurſt *verſus* Powell. Caſe.

Mich. 15 Jac. Rot.

PArkhurſt brought an Action of the Caſe againſt Powell, late Sheriff of Denbighſhire, and declared, that where he had recovered againſt one Richard Owen, in the Common Pleas Forty Pounds Debt, &c. and Owen was outlawed. That the Plaintiff delivered a Cap. utlagatum againſt him to the Defendant, then Sheriff, and that he having been in his Preſence would not arreſt him, being required, and returned the Writ Noſt eſt inventus. Upon Iſſue not Guilty, it was found againſt the Defendant. And it was moved in Arreſt, that this Action ſhould not have been laid in Middleſex, becauſe the Fault, which was the not arreſting him, was in Denbighſhire: Yet Judgment was given for the Plaintiff, for the falſe Return, which is in the County of Middleſex, was alſo a Wrong; ſo the Plaintiff hath his Choice.

Mid Election of divers Counties to lay Actions. Noy. 22. m' Brownl. 1. R. 12. 2 Cro. 532. m' Winch. 100.

7 Co. 1. b.

March. 19.

(265) Michell *verſus* Mortimer. Replevin.

Mich. 15 Jac. Rot. 727.

MIchell brought a Replevin againſt Mortimer, and Iſſue was taken whether one John Michell, and all thoſe whoſe Eſtate, &c. had uſed to have Common for all their Beaſts levant and couchant upon a Meſſuage, 200 Acres of Land, 50 of Meadow, and 50 of Paſture, in four Towns; the Jury find, that the ſaid Michell was ſeiſed of the ſame Houſe, Land, Meadow, and Paſture in the ſame four Towns, but that he had his Common as belonging only to the Meſſuage and 200 Acres of Land, 20 of Meadow, and 20 of Paſture in two of the Towns, and not to the Reſt; whereupon Judgment was given againſt the Plaintiff as failing in his Preſcription.

Preſcription miſlaid.

Pal. 270. 2 Cr. 630. 3 Cr. 531, 593. Noy. 76. 2 And. 89. Yel. 55. Ant. 72, 73.

(266) Parry *verſus* Paris. Information.

Paſch. 15 Jac. Rot. 1781.

PArry informed againſt Paris for Non-reſidence, the Defendant pleaded another Information in the Exchequer, exhibited there 28 April, Anno 14. for the ſame Abſence, upon Iſſue Nul tiel Record it appeared, that the Information in the Exchequer was exhibited 29 Aprilis in the ſame Year, and was for the Matter right. Whereupon Judgment was given for the Defendant.

Record fails or not.

Ante. 128.

(267) Welby *verſus* Canning. Scire fac.
Mich. 15 Jac. Rot. 2617.

Bail. The rendring of the Body muſt be of Record, and how it muſt be done. Mo. 868. 1 Roll. 337. 2 Roll. 576. Ant. 116. Winch. 42. 1 Le. 58.

WElby brought a Scire fac. againſt Canning, upon a Recognizance of Bail of ſix Hundred and Fifty Pounds for one Davenant, and ſhews, that he had Judgment Mich. 4 Jac. againſt Davenant, and that he did neither render his Body, nor ſatisfie his Debt. The Defendant pleaded, that after the Judgment, ſcil. 23 Jac. Anno 4. Davenant came into Court and rendred his Body to the Priſon of the Fleet, in Execution and Diſcharge of his Bail, and that the Plaintiff did refuſe to take him in Execution; and the Plaintiff denied the Yielding of his Body, and ſo an Iſſue. But it was reſolved by the Court, that this was ill pleaded, for the Yielding of his Body being an Act in Court, and in a Diſcharge of his Bail which is of Record, muſt be it ſelf of Record, and therefore ought to be concluded prout patet per record. and that the other Plea ſhould have been Nul tiel Record. But indeed in this Caſe there was no Record entred of it, and yet it was proved by the Oath of Calwick the Attorney, and another in open Court, that Davenant came in for that and other Cauſes, and was committed to the Fleet and after ſet at large. And in this Caſe divers Precedents were ſhewed for the manner of the Entry, upon the yielding of the Body upon the Bail, ſcil. P. 12 H. 8. Rot. 324. & P. 29 Eliz. & Tr. 20 Eliz. Rot. 125. between Young and Tomſon in exonerationem manucaptorum & poſtea, becauſe he was not prayed in Execution by the Party, he was diſcharged. Et P. 6 Jac. Rot. 105. ſuch a Yielding of the Body was entred in exonerationem manucaptorum. So the true Form is, that the Entry be made of Record of the yielding in Diſcharge of the Bail. But then if the Plaintiff, or his Attorney be preſent, he muſt make his Election to take him in Execution or to refuſe him, whereof Entry alſo is to be made. But (if he be abſent) the Party preſently muſt not be diſcharged, becauſe the Time of bringing him in is uncertain, for they receive him, if he be brought in at any Time before the Scire fac. againſt the Bail, or upon the Return of it, and therefore he muſt be committed, that the Party may have Time for his Election. But then when he is committed, the Uſe is, by Rule of Court to call in the Party, or his Attorney, to take or leave him, and ſo to enter his Acceptance, or Refuſal, of Record. But this is not a judicial way, for if the Plaintiff, and the Attorney be both dead, or in ſuch like Caſe, there muſt be a Means by Record to inforce an Anſwer; which I ſuppoſe muſt be by Scire fac. to the Plaintiff, or his Executors, to anſwer whether he will have him in Execution or not. And I am of Opinion, that though a Man refuſed thus to take the Defendant thus in Execution upon his yielding, and that entred upon Record, yet he may after take him by Capias ad ſatisfaciendum, for it is but a Forbearing for the Time to receive him upon his own Offer, for it is not a Renouncing or a Releaſing of his own Act of Execution, when he ſhall ſee Cauſe. But the principal Caſe I ended between the Parties arbitrably, and gave unto Welby 20 Pounds from Canning the Bail, and left him nevertheleſs his Remedy againſt Davenant the Principal, for his whole Judgment, being 208 Pounds.

2 Cro. 109. 1 Ro. 334.

2 Cro. 165. 1 Le. 58. Winch. 79.

(268) Norris *verſus* Staps.
Paſch. 14 Jac. Rot. 907.

Corporations have Power to make Laws, and the Validity of them. Meſme Caſe, Hutt. 5. 1 Roll. 364. Brownl. 1. R. 48. Mo. 869.

NOrris and Truſſell Guardians, and the Fellowſhip of the Weavers of Newbury, brought an Action of Debt of five Pounds againſt Staps, and declared, that Queen Elizabeth incorporated them An. 44. by that Name, and gave them Power to make Laws rationi conſonas, and not Contrary to the Laws and Statutes of the Realm, with a Proviſo to the ſame Effect; and that the Queen by the ſame Letters Patents did ordain for her, her Heirs and Succeſſors, that none ſhould exerciſe the Trade of Weaving within the ſaid Town, except he were firſt admitted thereunto, by the Guardians and Society of Weavers. And then ſhews the Act of 19 H. 7. and then that

that two Guardians, and the greater Part of the Fellowship of Weavers did make an Ordinance, that no Perſon ſhould uſe the ſaid Art of Weaving within the ſaid Town, except he had been an Apprentice to the Art within the ſaid Town, and had uſed it there by the Space of five Years before the Ordinance, or were admitted by the Guardians and Fellowſhip, upon the Pain of 20 Shillings a Month. And then ſhews the Allowance of the ſame Ordinance according to the Law of 19 H. 7. and that one of the Guardians gave Notice of it to the Defendant. And then ſhews, that the Defendant had uſed the Art, &c. there, by the Space of five Months after, whereas he had not been an Apprentice there, nor uſed the ſame Art there five Years before the Ordinance, nor was admitted, &c. Againſt the ſaid Ordinance and the Queen's Letters Patents, &c. The Defendant pleads nihil debet, and it was found for the Plaintiffs, and yet Judgment was given againſt them quod nihil capiant per bre. The Reaſon of the Judgment were groſs Faults in the Declaration. 11 Co. 54. b.

The firſt, That it did not appear that the Corporation did conſiſt of two Guardians, for there was no more declared, but that they were incorporated by the Name of Guardians, &c. which may be more than two, and they had omitted the Clauſe whereby the Number was appointed. I am of Opinion, that they needed not to ſhew how they were incorporated, for the Name argues a Corporation, as the like of Cities, and the Plea nihil debet (or the like) requires Proof of it. Plo. 537. a. Ante 64.

But the worſt Fault is in the Law it ſelf, for it excludes all Apprentices brought up in the Town it ſelf, after the Ordinance made, which is abſurd. Now I am of Opinion, that though Power to make Laws, is given by ſpecial Clauſe in all Incorporations, yet it is needleſs; for I hold it to be included by Law, in the very Act of incorporating, as is alſo the Power to ſue, to purchaſe, and the like. For, as Reaſon is given to the Natural Body for the governing of it, ſo the Body Corporate muſt have Laws as a Politick Reaſon to govern it, but thoſe Laws muſt ever be ſubject to the general Law of the Realm as ſubordinate to it. And therefore though there be no Proviſo for that Purpoſe, the Law ſupplies it. And if the King in his Letters Patents of Incorporation do make Ordinances himſelf, as here it was (as aforeſaid) yet they are alſo ſubject to the ſame Rule of Law. 5 Co. 63. a. 2 Inſt. 47. Kitch. 45.

But the Queſtion, which was chiefly intended, is indeed great, whether a new Corporation, having no Preſcription to appropriate and exclude others, can make a Law to exclude all Perſons to uſe an Art or Trade in their Town, whereunto they were not Apprentices within the ſame Town, though they ſerved their Apprentice-hoods to it elſewhere?

Wherein the Queſtion is between the particular Privileges of Towns, and the general Liberties of the People, which is fit to receive a Determination; for it runs through the Realm. But this Point was not ſpoken to at the Bench, as not neceſſary but reſerved 'till any other Action ſhould require it.

Obſerve theſe Degrees in the Conſideration of this Caſe.

Firſt, the Common Law did not forbid any Man to exerciſe any Trade, were he trained or not trained to it, or to exerciſe more Trades then one. But if any Man profeſſing a publick Trade would perform it Falſly, or Inſufficiently he were anſwerable. 1 Saund. 312. 11 Co. 53. b. 54. a. 1 Cro. 499. Palm. 544.

Secondly, that the Law, as it now ſtands, forbids no Man to uſe any Trade privately, as to be a Taylor in any Houſe, or the like, for that is not a Trade, but a Service, that is at mine own Peril, be it ill or well done. 8 Co. 129. b. Action ſur le Caſe, Br. 25. 1 Cro. 499.

Thirdly, that the Law (as it now ſtands) forbids no Man to exerciſe a Trade publickly, that hath been an Apprentice to it whereſoever. See the Caſe of the Taylor of Ipſwich, Co. lib. 11. 53. The ſimple Incorporating of a Town doth not draw by Conſequence a peculiar Trading to that Town, with an Excluſion of Foreigners; ſo then it muſt be the ſpecial Law or Ordinance that muſt work this Effect. 11 Co. 54. a. 84, 86.

Now of that the Things conſiderable in this and the like Caſes, what Societies, Companies, or Colleges of Men may make By-Laws, wherein not only Corporations made by Patents, or Preſcription, but all the Pariſhioners, or Townſmen of one Pariſh or Town, may make ſome; for they are by Common Law (as it were) incorporate for ſome Neceſſities both common and peculiar to that diſtinct Body, as for repairing their Church, or the like. Alſo the Tenants of one Manor may for their Common, or the like, make By-laws. But whether if there be a Lord and Court whereunto it belongs, that may be done, but in a Court, and by Conſent of all the Tenants, and with Conſent of the Lord, and by Preſcription, and what Pains may be ſet, and by whom to be levied, and to what Uſe, is conſiderable.

Cuſtom Br. 40.

5 Co. 63. bone.

Again, whether ſuch a Law may bind Strangers to the Law doing againſt it within the Precinct.

Again, what Notice is requiſite, either to the Free or to Strangers: And for theſe ſeveral Points, ſee theſe Books 44 E. 3. 19. 8 E. 2. F. Aſſize 413. 21 E. 4. 54. 11 H. 7. 13 & 21 H. 7. 40. & 21 H. 7. 20.

Jefferie's Caſe, Co. lib. 5. fo. 66. the Taylor's of Ipſwich Caſe, Co. lib. 11. fol. 53. Darcye's Caſe called the Monopolies. Co. lib. 11. fo. 84. and in that Caſe Davenant's Caſe cited; and Chamberlain of London's Caſe, Co. lib. 5. fo. 26. 62.

8 Co. 125. a.

(269) Don Alonſo *verſus* Cornero. Mich. 9 Jac.

Admiralty. 2 Brnl. 29. 13 R. 2. Cap. 5.

DOn Alonſo de Valaſco, Embaſſador for the King of Spain, libelled in the Admiral Court againſt one Cornero, (naming no other Defendant) declaring, that Cornero being a Subject to the King of Spain, had committed divers Crimes againſt the King, for which all his Goods were confiſcated, and that he was come into England and had brought with him 3000 Pound-weight of Tobacco, to the Value of 800 Pounds.

Ant. 31. 78, 79.

And prayed Attachment of the Goods in the Hands of (leaving a Space for Names) and after attached them in the Hands of Sir John Watts. Harris moved for a Prohibition for Watts, who had bought the Tobacco of Cornero for 800 Pounds.

The Judges ſaid, that they would not let the Embaſſador from proſecuting his Maſter's Subject. But for the Goods, if any Subject of a Foreign Prince bring Goods into the Kingdom, though they were confiſcate before, the Property of them ſhall not here be queſtioned but at the Common Law. And though Watts were not named in the Libel, yet he is a Party grieved by that undue Suit, and therefore Prohibition was granted. The like Prohibition was granted Hill. 9 Jac. upon the like Libel by Don Pedro de Sunega Embaſſador for Spain.

Ante 79. Accord.

(270) Palmer *verſus* Pope.

Ant. 78. 13 R. 2. Cap. 5.

MIch. 9 Jac. Palmer libelled againſt Pope, for that it was agreed between them ſuper altum mare, that Pope ſhould carry certain Sugars, and that the Agreement was after put in Writing in the Port of Gado, in the Coaſt of Barbary, and ſhews, that Pope ſuffered the Sugars to be ſpoiled ſuper altum mare by ſalt Water.

Vide ſupra.

Houghton Serjeant ſuggeſted, that the Charter Party was made in the Port of Gado, upon the Continent of Barbary, whereupon the Court reſolved, that a Prohibition lay, becauſe the original Contract, though it were made at Sea, yet was changed when it was put in Writing ſealed, which being at Land changed the Juriſdiction as to that Point; but if it had been a Writing only without Seal, it had made no Change; now then if the Contract were at Land, though the Breach be at Sea, which are two ſeveral Acts, yet becauſe theſe two muſt concur to make the Cauſe of the Suit which is intire, the Party ſhall be forced to ſue in the King's Court, becauſe that and the Common Law muſt prevail againſt other Courts and Laws; and theſe Caſes were cited for the King's Court, in the Caſes that might ſeem for the Admiral, 48 E. 3. 2. 10 H. 7. & Fitz. N. 118.

Ante 79. Accord.

6 Co. 48. a.

And

And it is a general Rule for Merchants, Embaſſadors, and the like, who make Bills, Accounts, and other Things in foreign Parts. And for the Juriſdiction of the Admiralty, ſee tempore E. 1. Fitz. Avowry, 192. 8 E. 2. Stamford 45 E. 3. 7 R. 2. title Treſpaſs, Statham 5 H. 6. 2 H. 4. 6 H. 6. and where the Stat. ſaith ad primos pontes, that is to be underſtood of Death or Main (as the Statute ſaith) not for Actions.

And the ſame Term Audly had a Prohibition verſus Jennings, who had in his Libel laid his Contract apud Malaga infra diſtrictas Maris vocat' The Straights of Gibralter infra juriſdictionem maritimam, becauſe it appeared that the Contract was made in the Iſland of Malaga, and then the Adding infra juriſdictionem maritimam is Vain. Ant. 79. 2 Brnl. 30.

Note, that every Libel in the Admiralty doth, and muſt lay the Cauſe of Suit ſuper altum mare, which argues that this is a neceſſary Point; for the Juriſdiction there groweth not from the Cauſe of Tythes and Teſtaments in the Spiritual Court, but from the Place. And therefore I am of Opinion, that if a Contract were made in truth at Sea, and a Suit upon that in the Admiral's Court, and there the Contract is laid generally, without ſaying, ſuper altum mare, the Prohibition will lie; for, the Libel muſt warrant the Suit in it ſelf, though you may on the contrary Part ſurmiſe, that the Contract was made at Land, againſt the Libel that lays it on the Sea. And I hold it alſo not ſufficient for the Libel to lay it infra Jur. mar. generally, but it muſt be ſo laid as it may appear to the King's Court to be ſo indeed. Mo. 892. Ant. 12. 1 Ro. 532. 2 Kebl. Litcot 8 Backwel.

(271) Abignye *verſus* Clifton. Chancery.

IN the Caſe between the Lord Abignye Plaintiff, and the Lord Clifton Defendant, in the Chancery, concerning a Promiſe ſuppoſed by the Plaintiff to be made to him of Aſſurance of Land upon the Marriage of his Lady, being Daughter and Heir apparent to the Lord Clifton, and his Lady. The King, by his Letters under his Signet Manuel, certified to the late Lord Chancellor, and alſo to this, the Manner and Subſtance of the Promiſe, as it was made to his Majeſty: In regard whereof, his Majeſty gave to the Lord Abignye 18000 Pounds in lieu of 1000 per Annum in Land which he had promiſed, which Certificate was allowed upon the Hearing for a Proof without Exception for ſo much. Roy his Certificat. Godb. 199. 9 Co. 102. a. b. 2 Ro. 685.

(272) Counteſs of Exeter *verſus* Lady Roſſe. & econtra.

IN the Caſe between the Counteſs of Exeter and the Lady Roſſe, there was an Intention to have had the Cauſe heard at Council-Table. But the Chief Juſtice and I, being called to the Queſtion before the King, delivered our Opinion, that ſince it was a Cauſe in this Nature fit for the Star-Chamber, being a Court of Juſtice; and that Sir Thomas Lake, on the Behalf of the Lady Roſſe, deſired that Courſe; it was not agreeable to Law to examine it at the Council-Table, where it could not be determined, and where yet thoſe voluntary Examinations might inſtruct and prejudicate the Witneſſes and Proofs after to be taken legally, and clearly, it would make the Witneſſes on either Part known, and the Conſequence of that would be, that all the Witneſſes would be Parties in their croſs Suits. Yet we agreed (becauſe the King and the Parties were ſo content) that if it were his Majeſty's Pleaſure to appoint his learned Council to examine ſecretly what his Highneſs ſhould think fit, and make it known only to himſelf, to uſe as his Wiſdom ſhould find Cauſe for ſome ſpecial Purpoſe, it might well be done, eſpecially the perſons being of Honour, and the Matter of a moſt ſcandalous Nature. And it was therefore agreed, that either Party ſhould be ruled by the King's Rule, who ſhould be made Defendants. And to all this Sir Edward Coke being preſent did agree. Scandal. Poſt 236.

Lord

(273) Lord Chancellor's Caſe.

Lord Chancellor's Preſentation to a Benefice above Value. Jenk. Cent. 292. Winch. 19.

THe late Lord Chancellor preſented to the Benefice of Stabridge, being of the Value of come to the King by a Lapſe, being the Inheritance of the Earl of Caſtle-haven, and the Clerk was inſtituted and induced; whereupon obtained a new Preſentation from the King, who required the Opinion of the Chief Juſtice, Chief Baron, and my ſelf upon it. And we certified, that the firſt Clerk being induced could not be removed by Law, for the Preſentation is under the Great Seal, and by the King in Law, being in his Name, and there is no Difference in the Form when it is for the King or for the Chancellor, ſaving that for the moſt Part the one is Mandantes, and the other is Rogantes. The Confuſion of which Words is of no Moment. But if the Preſentation it ſelf, under the Great Seal, had recited that the Benefice had been under the Value of 20 Pounds, in which the Chancellor was (as it is ſaid) abuſed by a falſe Note, brought as from the Office of First-fruits, it had been Void, for the Deceit appearing upon Record. (And therefore it were not amiſs, that Clauſe were inſerted in the Chancellor's Peculiars) or if the Clerk had not been inducted, the King might have revoked it, 38 E. 3. 4. the like Caſe.

2 Ro. 354.

(274) Hare *and* Leiſure.

Office of the Clerk of the Court of Wards granted but to one with a *Non obſtante*. Jenk. Cent. 292.

JOhn Hare and Nicholas Hare his Son, having a joint Patent of Clerks of the Court of Wards with an expreſs Proviſion, that if one of them ſhould die, that the other ſhould enjoy the whole non obſtante the Statute; John Hare being now Dead, Sir Steven Leiſure moved the King, that he might be joined by Patent to Nicholas the Survivor, upon Opinion that by Words of the Stat. 32 H. 8. (viz. that there ſhould be two Clerks to be named by his Highneſs to be Clerks of the ſaid Court.) This was referred by his Majeſty to Viſcount Wallingford, my ſelf, and Sir James Lea Attorney of the Court, and we certified the King (having heard the Council, and ſeen the former Grants, ever ſince the Erection of the ſaid Court) that the King could not make ſuch a new Grant as was deſired by Law, for ſince the Gift of the Office was meerly in the King, and that only meerly Miniſterial, the King was not bound to the Number, but might with a non obſtante diſpence with it, as he might give Alnage without the Nomination of the Treaſurer, name Sheriffs without Judges, Commiſſioners for the Admiral-Court without the Chancellor. But the Auditors Place being judicial and appointed to be two, cannot be leſs, becauſe the Subject hath Intereſt in the Judicature, which muſt be committed neither to more nor leſs than the Law of their Creation hath eſtabliſhed. And the Patents of the Clerks have always been ſome to one alone at the firſt, others as this, and ſo enjoyed.

3 Keb. 233. pl. 53. Dy. 212. a. 225. b. 303. b. Fint. 146.

Cr. Car. 595.

(275) Earl of Somerſet's Caſe.

Grant of Licence of Wines forfeits by Felony. 2 Ro. 780, 807. Jenk. Cent. 293. Syd. 260. 2 Cro. 512. Cr. Jac. 512.

THe Earl of Somerſet had obtained a Grant of the Licence of Wines, for Years, and took it in the Name of Sir John Daccombe, in Truſt for him. Whereupon the King willed the Chief Juſtice and me to call the Judges, and to give Opinion, whether it were forfeited by his Attainder of Felony, which we did, and it was reſolved una voce, that it was forfeited; and after reſolved ſo in the Exchequer, in Caſes of Chattels real and perſonal, and Things in Action of that Sort.

Price

(276) Prices of Wine.
The 24 of Dec. 16 Jac.

THe Lord Chancellor, Lord Privy-Seal, the Chief Justice and my self, met at York House, to set Prices of Wine, to be sold both in Gross and by Retail, either by Merchants or Vintners.

For our Power of setting Prices in Gross there was no Doubt, for by the Stat. 28 H. 8. Rast. Tit. Wines, we are authorised, and that is in Force. But for the Retail it was questioned; for there was one Statute made for that Purpose 34 H. 8. which was temporary and discontinued; but there was also a Statute made 37 H. 8. reciting the former Statute of 34 H. 8. but making also an express Act of it self for the setting of Prices, as well for Retail as in Gross by the said Officers, which at that time was not made Temporary, as 34 H. 8. but by Consequence was in it self at the first Perpetual, yet in the End of that Act, it is said in Rastal's Abridgment that by the Stat. 5 E. 6. it was continued, together with 34 H. 8. 'till the End of the next Parliament, and then discontinued: Now it is true, that 5 E. 6. hath such a Continuance which as to 34 H. 8. is effectual; but as to the 37 H. 8. (which was before Perpetual) it is idle. Neither can an affirmative Continuance of a Stat. Perpetual work an Abrogation of the Stat.

But then the Penalty mentioned in the Stat. 37 H. 8. is referred to that of 28 H. 8. which was only Forty Shillings, upon the Prices of Wine sold at the Price limited. For that Statute meddles only with the Sales in Gross, so this Stat. 37 H. 8. hath no certain Penalty for the disordered Sale by Retail, but that stands upon a simple Contempt.

Wines: The Stat. for setting of Prices of Wine. 348. 35 H. 8. cap. 7.

(277) Hicks's Case.
P. 16 Jac.

Star-chamber.

ONe sent a Letter closed and sealed up to Sir Baptist Hicks, which was so delivered to his Hands, containing many despiteful Scandals delivered ironice, as saying, "You will not play the Jew nor the Hypocrite, "and in that sort taunting him for an Alms-house, and certain good Works "that he had done, all which he charged him to do for Vain-glory." Whereupon Sir Baptist Hicks sued him in the Star-Chamber. And now upon the hearing it was resolved, that though it were not proved that the Defendant had any way published it, yet the Court would hold Plea of it, and so did, and fined the Defendant, and sentenced him to wear Papers, and to make his Submission to Sir Baptist Hicks in Cheapside; yet an Action of the Case will not lie in that Case for want of Publication, but the King and Commonwealth are interessed in it, because it is a Provocation to a Challenge, and Breach of the Peace.

Libel ironical and by Privy Letters. Co. 12, 35. Syd. 11. Try. 60. Bps. Tryal, 76. 1 Syd. 271. like Case.

Ante. 62. Post. 252. 1 Kebl. 772.

(278) Cocks *versus* Darson.
Hill. 15 Jac. Rot. 519.

COcks brought an Action of Trespass of Trover and Conversion of Beans against Darson, and coming to Trial at the Assizes upon not Guilty, because it was a small Cause, the Judge took not the Jury, but directed to move the Court and so it was, and the Case was, that the Lands whereupon the Beans grew were a Lunatick's, and Copyhold, and the Lord had granted unto one the Custody of the Land, by whose Leave and Assent the Plaintiff did sow the Land. And the Court was of Opinion, that the Action was to be brought in the Name of the Lunatick, for there was no Interest gained in his Land by this Commitment; and I do not agree, that the Lord hath Power over the Lunatick's Land without a Custom, for the Imitation of the King's Power over Freeholds makes not Consequence, for though I take the Statute to be but an Affirmance of the Common Law in the Case of the King, yet the collateral Incidents of Estates, as Dower,

Actions touching a Lunatick's Lands shall be in his own Name. Hutt. 16. mesme Case. Noy. 27. Pop. 141. 1 Leo. 328. l. 4 Co. 126. b.

2 Cro. 105. utra. qa' autrement sur' pt' de prejudice en ses Rts' & Services mes Hutt. 17. Accord.

Dower, Tenancy by the Courteſie, Wardſhips, and the Like, are not without ſpecial Cuſtom.

(279) Bidwell *verſus* Catton.
Hill. 15 Jac. Rot. 1765.

Aſſumpſit in conſideration of ceaſing a Suit, not averring that there was Cauſe of Suit. Meſme Caſe. 1 Roll. 19. 14. Ant. 18. Dier. Br. 79. p. 219. Mod. R. 169. 3 Cr. 561.

BIdwell an Attorney, brought an Action of the Caſe againſt Catton, Executor of Reve, and counted, that whereas he had in Michaelmas Term 14 Jac. proſecuted an Attachment of Privilege againſt Reve the Teſtator, returnable in Hill. Term, the Teſtator knowing of it, in Conſideration that at his Requeſt, the Plaintiff would forbear to proſecute the ſaid Writ any farther againſt the Teſtator, the Teſtator did promiſe to pay him Fifty Pounds, and then avers, &c. And after a Verdict it was excepted in Arreſt of Judgment.

1. Firſt, that it was not alledged, that the Plaintiff had any juſt Cauſe of Action.

2. Secondly, that this Action ſtill remains.

3. Thirdly, that this kind of Action would not lie againſt an Executor, becauſe it is not in the Nature of a Debt.

1. Judgment. 2 Cr. 126. But the Court nevertheleſs gave Judgment: For firſt, Suits are not preſumed cauſeleſs, and the Promiſe argues Cauſe, in that he deſired to ſtay off the Suit. Quære, if the Defendant had averred that there was no Cauſe of Suit.

2. 2 Cr. 684. Secondly, though this did not require a Diſcharge of the Action, yet it requires a Loſs of the Writ, and a Delay of the Suit, which was both a Benefit to the one, and a Loſs to the other.

3. 2 Cro. 663. utra. 2 Cr. 204, 404, 417. Dy. 14. a. 1 Ro. R. 266. 2 Cr. 571, 667. Thirdly, it was agreed, that if the Teſtator promiſe to build an Houſe, or to do ſome ſuch Collateral Act, that an Aſſumpſit upon that will not lie againſt the Executor. But the Court held an Action of Debt would well lie againſt the Teſtator for the Fifty Shillings, being a Sum of Money due upon a Contract in which he received quid pro quo; for the Forbearing of a Suit is as beneficial in ſaving, as ſome other Things would have been in gaining. Cr. Car. 194. And 17 E. 4. If a Man promiſe a Chirurgeon Money to cure a poor Man, he ſhall have an Action of Debt for it.

(280) Smith & Uxor *verſus* Stafford.
Hill. 15 Jac. Rot. 926.

Aſſumpſit by a Man to a Woman to leave her an Hundred Pounds if he marry her, and they marry. Hetly, 12. 2. Cro. 571. 2 Roll. Rep. 162. Yelv. 156. 2 Cro. 170. 1 Cr. 194. Noy. 26. 1 Roll. 343. Hutt. 17. Meſme Caſe. 2 Cro. 571. 1 Ro. 935. Pal. 99. Hutt. 17. 1 Brnl. 18. Godb. 271. 3 Cr. 27. Baron and Feme, their intermarriage extinguiſheth Perſonal Suits. It was not moved whether this Action would lie againſt the Executor. 2 Cro. 571. q' giſt adj. Yelv. 156. 2 Cro. 222. 2 Roll. 407. Cr. Jac. 417. Noy. 62.

ANdrew Smith and Anne his Wife were Plaintiffs againſt Richard Stafford, the Executor of Jeremy Stafford, and declared, that upon Speech of Marriage had between Anne and the Teſtator, he promiſed, that if ſhe would marry him, and he died before her, he would leave her worth an Hundred Pounds; and then ſays, that ſhe did marry him, and that he died and left her not worth an Hundred Pounds. Upon Non Aſſumpſit, and Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Promiſe was releaſed by the Marriage in Law. Againſt which it was objected, that this Action could not riſe during the Coverture, for it was not to be performed 'till after the Death of him which made the Promiſe, which is true; but yet it is a Promiſe preſently, and before the Act came to be performed, ſo the Lien, and binding of the Promiſe is already in Force, and therefore without doubt the Woman might have releaſed it before Marriage by the word Promiſe, not by the word Action, and what might be releaſed actually the Marriage releaſeth. See Hill. 5 Jac. Rot. 132. in the King's Bench, Belcher and his Wife brought an Action of the Caſe againſt Hudſon, upon a Promiſe unto the Wife, that if ſhe ſhould marry one Maſon at his Requeſt, he would give her after Maſon's Death Forty Shillings; the Defendant pleaded, that Maſon after Marriage did releaſe unto him all and all Manner of Actions, as well Real as Perſonal, and mixt Plaints, Debts, Contentions, Claims, Challenges, Controverſies, Variances, and Demands, &c. And yet Judgment was given for the Plaintiff. For never any one of theſe Words will reach it; the Caſe was compounded, ſo no Judgment was entred. And I was of Opinion, that by the Marriage the Promiſe was diſcharged

charged (the Husband being the Person liable) though it were true that the Action was not acted in his Time; and though by this Means the Promise must be ab initio (as a like Bond should be) inutile, which moved the other Judges to be of another Mind. But the Rules of Law must not be guided by the Improvidence of others. 3 Cr. 370. March, 88. Cr. Jac. 571.

(281) Crookhay *versus* Woodward.

Hill. 15 Jac. Rot. 2001.

Covenant. Bulst. 1. R. f. 41. 1 Brnl. 21. Winch. Ent. 154. Br. Condition, 151.

CRookhay brought an Action of Covenant against Woodward, and declared, that the Defendant by his Deed shewed in Court did covenant with him, that he would satisfie him all such Sums of Money, &c. as Josias his Son, the Plaintiff's Apprentice, should imbezel from him, within three Months after Request; and then lays the Imbezelling and Request, &c. The Defendant prayed Oyer of the Deed, which was entred in hæc verba, and there the Covenant was to satisfie within three Months after Request and due Proof made of such Imbezelling; whereupon the Defendant took Issue, that Josias the Apprentice did not imbezel, and it was found for the Plaintiff, to the Damage of And now it was moved in Arrest of Judgment by Chibborn, because it appears by the Entry of the Deed, that the Plaintiff ought not to have brought his Action 'till the three Months were incurred, as well after Proof as after Request; whereas the Plaintiff had averred no Proof in the Declaration, and this Exception was allowed as effectual as if the Defendant had demurred; for the whole Case appears to the Court by the whole Record, whereof the Deed entred is Part, as fully as if it had been in the Plea.

Proof, how to be understood in Law. Ben. 139, 232. Mo. 113, 180. 2 Cro. 488. 4 Co. 74. b.

But the great Question was, How this Matter of Proof should be understood in Law, whether a Proof in Court judicial, or Proof out of the Court, and how it should be made? And first, it was agreed by the Court, that the word Proof generally laid, shall be understood a Proof judicial, by Jury, Confession, or Demurrer in Court. It was also agreed, that if the Form of Proof were appointed in the Writing otherwise, that should prevail, as in Gold's Case supra 92. or if it were upon Proof made by Certificate, as is used for Travellers, or by Witnesses before two Aldermen, or the like, which appears cannot be Judicial: Which Proof shall be set down in the Plea, with all the Circumstance, and then it shall be put in Discretion of the Court, to judge whether that Proof were competent according to the Meaning of the Writing. And so no new Proof shall be made in the present Action, and being brought before he ought to have Remedy, he can have no Judgment, as in the Warrantia Chartæ he may. But in the principal Case, because the word Proof is left at large, and may be made in Court judicially in an Action brought against the Apprentice, before the Action brought upon this Covenant made by another; it may very well in this Case be taken of a Proof by Trial in Court, and so is every way against the Plaintiff, that hath brought his Action of his own shewing before he had Cause, and so is judged against the Plaintiff in this Case. 2 Cro. 38. Mo. 845. Syd. 57. 1 Saund. 282

Note, that a Warrantia Chartæ, or a Writ of Mean may be brought before the Party take Loss: But yet he hath Cause of that Action when he brings it, which is, that having a Warranty or Acquittal, he sues Quia timet to establish the same by Judgment, to bind the Land of the Warrantor, &c. pro loco & tempore; which kind of Action is but provisional, not presently remedial, but after by Scire fac. but the Action of the principal Case being remedial, and like unto the Case of a Proof, of a Surmise per Testes, the Court judgeth whether it be sufficient or not.

Obligation.

(282) Warley *verſus* Beckwith.
Hill. 15 Jac. Rot. 931.

Arbitrament leaving Matter in Suſpence. Ant. 49. 2 Ro. R. 189, 214. Br. Arbitrament, 17. Syd. 59. 1 Roll. 250, 251.

2 Cro. 315, 585.

DEbt upon an Obligation of Forty Pounds by Warley, againſt Beckwith; the Condition was to ſtand to the Award of Gibſon and Barwick, to be made ante Feſtum Sancti Andreæ the Apoſtle. The Defendant ſaith, that they made no Award. The Plaintiff ſaith, that the Arbitrators aforeſaid, reciting divers Sums of Money, alledged by the Plaintiff to be due unto him by the Defendant, &c. On the 18 Day of November did Order, that the Defendant (inter alia) ſhould pay nine Pounds to the Plaintiff. And further, that if the aforeſaid Defendant, at, or before the Feaſt of S. Andrew the Apoſtle then next following, ſhould before the ſaid Auditors, or either of them, diſprove the Payment of any of the ſeveral Sums aforeſaid, or any Part thereof; then ſo much ſhould be deducted out of the Payment of the ſeveral Sums aforeſaid; and upon Iſſue, that they made no Award; after Verdict for the Plaintiff it was moved, that the Award was not ſufficient, & Curia adverſare vult, whether this Reſervation ſhall fruſtrate all Reaching to the Award, or whether the Award ſhall ſtand, and the Reſervation be void.

1 Syd. 59. q' l'agard e void. 2 Cro. 584, 585.

Deceit.

(283) Howard *verſus* Salkeld.

Ro. 2d. R. 127. 2 Cro. 547. Palm. 56. 7.

MY Lord William Howard having a Judgment in a Ceſſavit againſt Thomas Salkelk Eſquire, the Tenant before Execution brought a Writ of Deceit, and becauſe that would not ſtay Execution, he brought alſo a Writ of Error; and though both theſe Writs tended to avoid the Judgment, yet becauſe they were upon ſeveral Reaſons and Reſpects, they were both allowed.

(284) Kid *verſus* Chineley.
Tr. 15 Jac. Rot. 2219.

Executors *pleinement adm. ſpecial.* Ante. 133. Noy. 106.

Judgment.

DEbt againſt Executors, who pleaded three Judgments of an Hundred Pounds a-piece, and that he had paid Forty Pounds in full Satisfaction of two of the Judgments, and that he hath not nor had, &c. præterquam, &c. the ſaid Forty Pounds, and Twenty Pounds more, which is not ſufficient to pay the other; whereupon the Plaintiff demurred, and adjudged for the Defendant, for it is a pleinement adminiſter ſpecial.

Debt.

(285) Bawtrey *verſus* Iſted.
Mich. 15 Jac. Rot. 3149.

Stat. 2 E. 6. for not ſetting out Tythes. Brownl. 1. R. 52. Winch. Ent. 197, 209, 211, 224. 1 Cr. 513. 3 Cr. 621, 766. Ant. 188. Mo. 302, 452, 914. 2 Ro. R. 430.

BAwtrey Verſ. Iſted. Debt upon the Stat. of 2 E. 6. for not ſetting out Tythes; the Defendant pleaded Nihil debet, and adjudged a good Iſſue.

(286) Cheſter & Uxor *verſus* S. George.
Hill. 15 Jac. Rot. 1972.

Judgment.

1 Cr. 138. 2 Cr. 80, 123, 673.

CHeſter and his Wife brought an Action of Treſpaſs againſt S. George. The Defendant pleaded, that another S. George was ſeiſed, and died ſeiſed, &c. and it came to him as Heir. The Plaintiff replies, that before &c. one Burgen was ſeiſed, and made a Leaſe to one Marſhall, who died Inteſtate, and the Adminiſtration committed to the Wife Plaintiff, and traverſed the dying ſeiſed, and found for the Plaintiff. In Arreſt it was moved, that the Plaintiff ſhould have ſhewed the Letters of Adminiſtration: But the Court gave Judgment for the Plaintiff, becauſe his Poſſeſſion, which is affirmed in the Verdict, was his Title, and the Adminiſtration was but an Inducement to the Traverſe.

Drury

(287) Drury *againſt* Fitch. Caſe.

Hill. 15 Jacobi.

DRury brought an Action of the Caſe againſt Fitch, for theſe Words, I arreſt thee for Felony, and at the Trial the Plaintiff was Nonſuit. And now it was ſaid by his Council, that the Defendant was to have no Coſts, becauſe the Words were not Actionable, and ſo Judgment was to be given againſt the Plaintiff for that, and not for the Nonſuit. And it was ſaid, that he had been ſo ruled in the King's Bench: But I was of a contrary Opinion, for the Words of the Law are plain and general, that the Defendant ſhall have Coſts upon the Nonſuit; and the Vexation is the more groſs if there were no Cauſe of Action, for elſe a Man might ſue with more Safety where he had leaſt Cauſe. And ſo Coſts were adjudged.

Action for Words, I Arreſt thee of Felony. Hutt. 16. Meſme Ca. Bend. 161. 2 Ro. R. 86. Pop. 150, 211. Coſts againſt the Plaintiff upon his *Non-ſuit*, where there was no Cauſe of Suit. 1 Cro. 175. Cr. Jac. 159. Poſt. 284.

(288) Sibyll Yardly *verſus* Sir Arthur Ingram. Aſſumpſit.

Hill. 15 Jac. Rot. 943.

SIbyll Yardley brought an Aſſumpſit againſt Sir Arthur Ingram, and declared, that Sir Edward Grevill was indebted unto her one Hundred and Sixty Pounds, and that ſhe told the Defendant, that ſhe would arreſt him for it: Whereupon the Defendant, upon Conſideration that ſhe ſhould at his Inſtance forbear, did promiſe to pay her ſo much as ſhe ſhould prove due unto her by the ſaid Edward. And that thereupon ſhe did forbear until this Time, and though one Hundred and Sixty Pounds were due, and ſhe can well prove it, yet the Defendant hath not paid her; and upon Non Aſſumpſit, it was found for the Plaintiff; and after the Arreſt it was moved, that the Conſideration was not Sufficient, becauſe there was no Time of Forbearance provided, for ſo it might be a Minute: But I ended the Cauſe by Compoſition.

Conſideration to maintain an *Aſſumpſit*, for Forbearance of a Suit, not laying how long. Hutt. 46. 1 Le. 61. Pop. 31. Ant. 18, 216.

Pop. 183. Latch. 151. Hetl. 62. 2 Cro. 684. q' bon' adj' Hutt. 47. Cr. Jac. 250, 397, 683. Cr. Car. 241, 438.

(289) Guffly *verſus* Pindar.

A Record of a Prohibition was ſhewed by John More Serjeant, Paſch. 14 Jac. Rot. 1918. between Guffly Plaintiff, and Pindar, Parſon of Mottesfont, in the County of Southampton, for Tythes of Willows, upon Surmiſe that they are of Uſe, as Timber in that Country: If Willows grow within the Site of an Houſe, it is Waſte to fell them, yet if they be felled I hold they ſhall pay Tythes. Note the Reaſon.

Diſmes for the Tythe of Willows, and averring that they were of uſe for Timber there. Diſmes Br. 4. Plo. 470. a. Cr. Jac. 199.

(290) Bland's Caſe *verſus* Edmonds. Caſe.

Paſch. 16 Jac. Rot. 444.

GEorge Bland brought an Action of the Caſe againſt A. B. for ſaying, that he was indicted of Felony at a Seſſions holden at and did not aver that he was not indicted: And after a Verdict for the Plaintiff, Judgment was ſtayed, becauſe there was no Averment ut ſupra. It was alſo queſtioned for the very Words, becauſe an Indictment is but a Surmiſe.

Action of Words, thou waſt indicted of Felony, not averring that he was not indicted. Hutt. 18. Meſme Ca. Brownl. 1. R. 13. 2 Cro. 268. Ant. 177. 2 Cr. 154, 247. 2 Cr. 536.

(291) Crittal *verſus* Horner. Caſe.

CRittal brought an Action of the Caſe againſt Horner, for ſaying, that he had caught the French Pox, and had carried them home to his Wife, and had Judgment: The Slander is not in the Wicked Means of getting them, but in the Odiouſneſs of the Infection, as a Leper, 2 Cro. 144. 1 Roll. 44.

1 Roll. 43. 3 Cr. 214, 289, 648. 2 Cro. 144, 439.

Battery.

(292) Clasebrooke *verſus* Liveſey.

Paſc. 16 Jac. Rot. 2313.

Confeſſion of Action refuſed after Iſſue joyned. 1 Brnl. 196. Noy 31. Br. Confeſſion, 4.

CLaſebrooke an Attorney brought an Action of Battery, &c. againſt Liveſey, in the County of Wigorn: The Defendant pleaded not Guilty, which was entred. And now the Defendant would confeſs the Action, which the Plaintiff was not willing to accept, becauſe the Defendant had ſome Power with the Sheriff, before whom the Inquiry of Damage ſhould be. Whereupon though all the Prothonotaries ſaid, that they had never ſeen a Confeſſion refuſed, if it were offered before the Niſi prius ſealed, yet the Court did in their Diſcretion refuſe it; as well as becauſe the Wounding was grievous, as to avoid Error.

Star-chamber.

(293) Wrenham's Caſe.

Star-Chamber for ſlanderous Petition, againſt the L. Chancellor.

It is Lawful to complain to the King of Injuſtice.

YElverton Attorney-General informed in the Star-Chamber, ore tenus, againſt John Wrenham, for a Complaint by him exhibited againſt Sir Francis Bacon, Lord Chancellor to the King, in a Book containing a Scandalous Cenſure of a Decree made by the ſaid Lord Chancellor againſt him, for one Sir Edward Fiſher. In the Sentencing of which Caſe it was reſolved by the whole Court, that it was lawful for any Subject to Petition to the King for Redreſs in an Humble and Modeſt Manner, where he finds himſelf grieved by a Sentence or Judgment; for Acceſs to the Sovereign muſt not be ſhut up in Caſe of the Subjects Diſtreſſes; but on the other Side, it is not permitted under Colour of a Petition and Refuge to the King, to rail upon the Judge or his Sentence, and to make himſelf Judge in his own Cauſe, by Prejudging it before the Re-hearing (for which his Suit to the King ſhould be) which Wrenham in this Caſe did through his whole Book, with the moſt deſperate Boldneſs and deſpightful and virulent Words that was poſſible. It was alſo reſolved, that the Juſtice of the Decree was not to be queſtioned in this Caſe, for that was not the Point now examinable, though in that it did appear, that he had done my Lord Chancellor much and great Wrong. So he was cenſured a Thouſand Pounds Fine.

This Argument was, Tr. 16 Jac.

(294) Anne Needler *verſus* Biſhop of Wincheſter.

Hill. 12 Jac. Rot. 1844.

Quare Imped. Waller. Surrey. 1 Brnl. 162, 348. 35 H. 8. Cap. 21.

The Stat. 31 H. 8. of Monaſteries, the Clauſe of Confirmation of Grants to, and from the King, there expounded at large.

" ANne Needler brought a Quare Imped. againſt the Biſhop of Wincheſter,
" and George Needham, Clerk of the Vicarage of Horley in the Coun-
" ty of Surrey, and declared, that one Robert Briſtow was ſeiſed of the Par-
" ſonage of Horley, whereupon the Advowſon of the Vicarage belongeth,
" and that the Vicarage avoided by the Death of one Lucas; and that it
" was then in the Hands of Queen Elizabeth, by the Wardſhip of Robert
" Briſtow, the Son of the firſt Briſtow, who preſented William Browne, and ſo
" conveys the Parſonage ad quam, &c. by divers mean Conveyances to one
" James Cromer in Fee, and that he the firſt of January, 1901. did grant unto
" Francis Foxton the next Avoidance of the Vicarage, who granted the ſame
" unto Henry Needler, and the Plaintiff then his Wife; and that Henry
" Needler died, and that it ſurvived unto her, and then the Church became
" Void by the Death of William Browne Incumbent, and ſo it belonged unto
" her to preſent: This being the next Avoidance after the Grant to Foxton.
" Needler pleads in Bar as Parſon imparſone of the Vicarage, and ſays,
" that King Henry 8. was ſeiſed of the Parſonage of Horley, ad quam, &c.
" and that he died ſeiſed of it, and ſo makes the Deſcent to King Edward
" the 6. and Queen Mary, and laſtly to Queen Elizabeth, by Force whereof
" ſhe was ſeiſed in Fee, and ſo ſeiſed ſhe preſented firſt one Lucas, and then
" the ſaid William Browne, and now upon the Death of Browne, the King
" preſented

" preſented him the Defendant: At whoſe Preſentation he was inſtituted
" and induced, and traverſeth without that, that Robert Briſtow the Father,
" was ſeiſed of the ſaid Rectory, ad quam, &c. as the Plaintiff had alledged;
" whereupon Iſſue is taken, and the Jury find a ſpecial Verdict thus."

That one Robert Southwell, and Margaret his Wife, were ſeiſed to them and the Heirs of Robert, of the Rectory of Horſham, in the County of Suſſex, and the 10 Day of May, 31 Hen. 8. by the Deed of that Date did give the ſame Rectory, &c. to King Henry the 8. and his Succeſſors. And that King Henry the 8. being ſeiſed of this Rectory of Horley, ad quam, &c. by his Letters Patents bearing Date 21 Julii, 31 H. 8. In conſideration. pred. Rectoriæ de Horſham, &c. per pred. Robertum Southwell, & Margaretam eidem nuper Regi hæredibus & ſucceſſoribus ſuis, dat conceſſ. de gra &c. dedit & conceſſit præd. Roberto Southwell & Margaretæ, the ſaid Rectory of Horley; and the Advowſon of the Vicarage, inter alia quæ nuper monaſterio de Horley in eodem Com. de Surry modo diſſolut. ſpectabant, & pertinebant, Habend. to Southwell and his Wife, and the Heirs of Southwell. And that afterward, that is to ſay, 26 Day Julii An. 31 H. 8. and not before, the ſaid Southwell and his Wife came into the Chancery, and did acknowledge the ſaid Deed, which Deed was afterwards duly inrolled. And then they find a Conveyance of the Parſonage of Horley, ad quam, &c. to the ſaid Robert Briſtow and his Heirs, and ſo conclude the Verdict: That if the Court ſhall judge that Robert Briſtow the Father were ſeiſed in Fee, then they find, that he was ſeiſed in Fee. Et ſi contra, then econtra. 2 Ro. 399.

And I am of Opinion, that Briſtow was ſeiſed in Fee, and conſequently that Judgment ought to be given for the Plaintiff.

The Points are two.

The firſt, whether the Conſideration in the King's Grants were true, and good in Law or not.

The ſecond, whether the King's Grant were good, be it that the ſecond Conſideration were true or falſe, good or not good.

The firſt Point, for more clear Diſtinction, I will divide into two.

The firſt, whether the Conſideration were good, if the Husband had been ſeiſed alone, and the King's Grant had been made in Conſideration of his Grant alone, and ſo no other Fault but that his Gift hath not been then inrolled: And I think it had been good even by the Common Law.

The next, whether the Joyning of the Wife's Grant to the Husband, in the Point of the Conſideration hath made the Conſideration falſe. And I think it hath, and that neither to be cured by the Common Law, nor by any Statute, that is, the Conſideration cannot be made a good and true Conſideration.

To the ſecond Point, I hold the King's Grant ſufficient, notwithſtanding that the Conſideration be falſe and void, and that only by the Help of the Statute of 31 Hen. 8. and this I hold to be clear and out of doubt.

As to the firſt Point, the Caſe is, that Southwell and his Wife, being ſeiſed of the Parſonage of Horſham to them, and the Heirs of Southwell, did Grant the ſame to King Hen. the 8. and his Heirs by their Deed, 10 Maii An. 31. and then the King by his Letters Patents 21 July Anno 31. did Grant this Parſonage of Gorley (whereunto this Advowſon of the Vicarage belonged) to them and the Heirs of Southwell, in Conſideration of the Parſonage of Horſham, &c. given and granted by them to him, not ſaying by Deed, nor by what Means.

Then after 26 July An. 31. the Deed was acknowledged by Southwell and his Wife, and inrolled ſecundum formam Stat.

Upon this Caſe I am of Opinion, that though the Deed to the King were not acknowledged, nor inrolled at the Time of the Grant made by the King, yet the Relation of the Inrollment, and the Operation of the Law ſhall make the Conſideration true in Effect and Sufficient, as touching the Husband's Eſtate, and the King not deceived; which is the true Reaſon that makes a Patent void, when the King is deceived in the real Conſideration that moveth and cauſeth this Grant: For when the King makes a Grant Ant. 165.

by

by the Word ex mero motu, and yet expreſſeth a real Conſideration moving his Grant, which is falſe: Now (ſince theſe are Contraries, and cannot ſtand together) the Law ſhall judge upon the expreſs Conſideration, and ſhall not regard the Clauſe of the Form ex mero motu, which is Clauſula Clericorum; but ſhall reject that, as the Court doth the Opinion of the Jury, when they find the Fact, and conclude upon it contrary to Law, as in Aimy Townſend's Caſe, & 9 H. 6. iſſint nient ſon fait.

Patents, Br. 80. 4 Co. 42. b. Accord.

Conſiderations in the King's Grant at large. 5 Co. 94. a. 2 Cr. 147. Plowd. 455. a.

Now for the Conſiderations they may be Falſe, and yet not defeat the Grant; as Conſideration of Money paid, or Conſideration of Service, 378. B. Patents and St. Saviour's Caſe, Coke lib. 10. 67, 68.

The Reaſon is not, becauſe the King is not deceived verbally, but becauſe the Law doth not eſteem ſuch a Deceipt, ſo weighty or material, as to deſtroy the Grant, much leſs here where the King is not deceived at all in Effect: For the King hath the Parſonage of Horſham, &c. and that by the Grant of Southwell, which was made before the Kings Grant, and muſt be ſo pleaded, as made, 10 Maii.

Inrollment of a Deed to the King, how it relateth. 2 Inſt. 675. Ant. 136. Plo. 79. b. Mo. 616. Pal. 466.

And though it be true, that was not compleat, nor perfected for Want of Inrollment at the Time of the King's Grant, yet when the Inrollment came upon it, it takes his Effect, neither from the Inrollment nor by it, but from and by the firſt Act: And therefore between the Parties it ſhall bind to all Purpoſes ab initio, though this be in a collateral Reſpect.

4 Co. 71. a. 3 Co. 29. a. Plo. 316. Godb. 218. 2 And. 161.

And therefore I am of Opinion, that if I give my Land to the King by Deed, and after charge the Land, and then I levy a Fine to the King of the ſame Land, and then the Deed be inrolled, that the King ſhall hold the Land diſcharged. And Hind's Caſe is not like, for there the latter Conveyance prevails, becauſe it extinguiſheth the Uſe, without which the Bargain and Sale works not. So 1 Hen. 7. 31. a Feoffment is made to one for Life, the Rem. to the King, the Rem. ſhall take Effect, though the Inrollment follow long after. So in Hall and Winckfeild's Caſe, a Recognizance acknowledged before me, in the Vacation at Serjeant's Inn, being inrolled the Term after was ruled, to bind from the Acknowledgment.

Ant. 195, 196.

Ant. 136.

So P. 15 Jac. Bull ſold to Dimmock the Manor of Pipe, Dimmock died, then the Deed was inrolled, yet it was reſolved, that the Heir ſhould be in Ward.

Deut. 174.

So upon the Caſe of 38 E. 3. 11. of a Feoffment within the View and Entry after; and Bullock's Caſe, 17 Eliz. of a Feoffment of Land uncertain with Election. For theſe are not, nor cannot properly be called Fictions of Law, but are real Acts, compounded of ſome Simples, which make not a compleat or intire Act 'till they come together, and then they make one perfect Act, working by their Nature ab initio, even as others do that are in their Nature ſingle: But thoſe Things are properly Fictions in Law that have no real Eſſence in their own Body, but are ſo acknowledged and accepted in Law, for ſome ſpecial Purpoſe, as Littleton tit. Releaſes. He that hath alienedDy. 281. 2 Co. 36. a.

Co. L. 265. b.

hanging the Writ, may as long as that Writ hangs, accept a Releaſe of the Demandant; ſo may a Vouchee, after he hath entred into the Warranty: For, though they be not Tenants, yet the Laws and the Parties have allowed them as Tenants, inter ſe, for that Suit. So 38 E. 3. 29. an Infant in ventre ſa mere may be vouched. 10 Co. 32. b.

Stat. 31 H. 8. 7 Co. 9. a. Poſt 338. Co. L. 265, 390. a.

But if the Husband's Grant could not be made true by Common Law, the Stat. of 31 H. 8. of Monaſteries could not help, becauſe that Grant by the Husband was made, as in the Caſe appears, after the Parliament began, which was 28 Aprilis 31 H. 8. and the Statute only extended to Grants made and paſſed ſince 4 Feb. 27 H. 8. which muſt be underſtood before this Parliament 31 H. 8. for it is true, that all Acts of Parliament have their Effects from the Beginning of the Parliament, or ſeveral Seſſion of Parliament, as it is reſolved 3 H. 8. B. Parliament 86. in Partridge and Croker's Caſe, Plow. 79. except the Act it ſelf appoint another Term, from which it is to take his Effect.

Yel. 127. Ant. 111. 4 Inſt. 25. Dy. 74. b. 95. a. 171. a. 1 And. 295. Ant. 111. 41 Cr. 424.

Mo. 681.

But the Stat. 34 H. 8. will help it, for that extends to all Grants made to the King, from 27 H. 8. 'till that Parliament, and ſeven Years after, and helps (amongſt other Things) Want of Inrollment.

againſt

Againſt which it was wittily objected by my Brother Finch (whereunto my Brother Hutton alſo inclined) that this Deed was inrolled long before the Statute, and ſo holds its Perfection by the Common Law, and therefore neither needed nor could have any Aid by this Law, as a Deed not inrolled.

But to this I anſwer, that there was a Time when it was not inrolled, and this Statute makes the Deed good and effectual, according to the Meaning from the Beginning, when it was not inrolled, and is all one for this Caſe, as if a Statute were made in general, that all Grants by the King ſhall be good without Enrollment, and then a Grant is made; it is ipſo facto good, by the Statute to all Purpoſes, though Inrollment follow, by which it would have been good without the Statute.

And though this Grant were good by the Inrollment before the Statute; yet it was not ſo to make the Conſideration true at the Time of the King's Grant, for want of Inrollment then; but, that is the Work of this Statute to make it ſo good, and to that purpoſe.

But now for the Woman's Act, I am of Opinion, that the Conſideration cannot be made good and true, neither by any Rule of Common Law, nor by any Statute.

For firſt, where it was objected, that ſince the Wife had but an Eſtate for Life in the Thing granted to the King, if either the Husband ſurvived, or the Wife diſagreed to the Eſtate, the King was to enjoy the Land abſolutely, by the Grant of the Husband alone, without the Wife, as well as if ſhe had joined in the Fine, and it doth not appear that ſhe ever did, or could, impeach the King's Eſtate.

If the Wife had had no Eſtate at all, nor had been Dowable, I am of Opinion, her void joyning could not have hurt.

To this I anſwer, that the Conſideration muſt be taken as it is, which is not in Conſideration that the King ſhould enjoy the Land, but in Conſideration that the Husband and Wife had granted it to the King, which in this Caſe is not true, for the Wife's Grant is utterly void; but if it had been a Grant, though defeaſible, it might incline to allow it good. Ant. 204.

As if the King, in Conſideration of Land conveyed by I. S. to the Lord Treaſurer, for the King's Uſe, ſhould Grant to I. S. and the Land conveyed by I. S. were gotten by Diſſeiſin, and the Diſſeiſee ſhould enter upon the Lord Treaſurer, yet the King's Grant ſhall ſtand good, for the Conſideration was true, and you muſt not ſtrain it beyond the Word, by any imaginary Intent; for elſe, if the Land were evicted by a Writ of Right, the Reaſon were all one, and the Conſideration doth not intend a general Warranty.

And therefore in the Caſe of Alton Wood's where the Conſideration was the Surrender of Letters Patents by the Husband and Wife of an Eſtate of Free-hold, it was reſolved to be good, though it did appear that the Wife's Eſtate could not be ſurrendred, which might be thought the King's Intent mental, but is not the expreſs legal Intent: It was the King's final Intent to have the Land by Surrender, but he required only a Means which he had, and that was only inutile. 1 Co. 43. a.

The King in his Patent deceived in his final Intent.

Again, where it was ſenſibly objected, that the King was not deceived in the Matter of Fact, but in the Effect of Law, how the Wife's Grant ſhould work in Law, & ignorantia juris non excuſat, and then the Caſe ſhould be no other than as if the King had ſaid, Southwell and his Wife have made me a Grant, which is indeed void in Law, as to the Wife; yet in Conſideration that they have granted me the Land, I grant unto them the Parſonage of Harley, &c.

The King deceived in judging the Law. Mo. 164.

To this I anſwer two ways.

First, that for ought appears to the Court, the King is deceived in the Fact; for his Grant is in Conſideratione pred. Rectoriæ de Horſham, &c. per pred. Southwell and his Wife, eidem nuper Regi dat. & conceſſ. So it refers to a Grant in general, which might be by Fine, and not by Deed at all, much leſs by this Deed. First Anſwer.

My ſecond Anſwer is, that though the King be deceived but in Law, yet that will not preſerve the Grant; for it is not only the Fraud of the Party that fruſtrates the Grant, as a Puniſhment of his Deceit: But if it appear in the Body of the Patent, that the King errs in his Judgment to his Prejudice, that will make the Grant void. Second Anſwer.

Therefore

Therefore 18 H. 8. Brooke Patents 104. If the King gives Lands to one and his Heirs Males, it is judged in the Exchequer Chamber to be utterly void, yet it is but Error in Law (taking that for an Eſtate in Tail, which is by the Law a Fee ſimple) and Alton Wood's Caſe, lib. 1. the King being Tenant in Tail, the Reverſion to himſelf in Fee, gave the Land to Walſh in Tail. This was adjudged void, not becauſe the Eſtate was miſtaken, as in the other Caſe 18 H 8. but becauſe the King did err in the Form and Manner of the Eſtate, intending that entire which could not be ſo. And Gawdy is there of Opinion, that though the King had recited his divided Eſtates, yet it could not have bettered his Grant. Unto which Opinion the two Chief Juſtices did alſo agree; and yet then he had taken Knowledge of the Fact, and had only miſconceived the Law, that his Grant might nevertheleſs work entirely.

1 Co. 46. a.

And the Lord Chandos's Caſe, Co. lib. 6. 55. is not contrary. The Caſe is, that K. H. 7. gave the Manor of Blunſden to Giles Candos in Tail, and then the King reciting, that he had ſurrendred his ſaid Patent, by Force whereof the King was ſeiſed in his Demeſne as of Fee, gave the ſaid Manor to him and his Wife; and it was holden that this Grant was good in Law, to paſs the Reverſion in Fee only; whereof two main Reaſons were given. Firſt, that leſs paſſed than the King meant, that is, the Reverſion in Fee inſtead of the whole Eſtate in Fee. Secondly, that it was not made part of the Conſideration of the Grant, and therefore if the Grant had been in Conſideration, that by the Surrender of the Patent, the King had been ſeiſed in Fee, in Poſſeſſion, he had granted it again, &c. it would have been void and then it had been like the principal Caſe here.

8 Co. 56. a. Accord.

And the ſame Reaſon that ſupplies the King's Ignorance of Matters in Fact, will alſo excuſe his want of Knowledge even of the Laws, in the ſubtilties of it. For, he ſtudies a greater Art, ſc. Arcanum regni, the Art of Regiment, which is Ars Artium, and contains all Arts, as the Commonwealth includes all private Societies.

Tu regere Imperio populos Romane memento,
Hæ tibi erunt Artes, pacique imponere morem.

As touching the Meaning of the Statute to this Purpoſe: The Purpoſes of theſe Statutes were to eſtabliſh Conveyances to and from the King, according to Natural Equity ſecundum æquum & bonum, which is Lex legum, without reſpect to legal Ceremonies. But it was never meant to inable thoſe Perſons, nor their Grants, who by natural Defects or Diſablements, were either by the Law of Nature or the Law of the Land diſabled to grant.

The Wives Grant not made good by any Statute. 2 Cr. 124, 264.

Mo. 338. 11 Co. 78. a

And therefore if an Ideot, or Lunatick, or an Infant under ſeven Years of Age had made a Grant to the King, this Statute had never made them good, for jura naturæ ſunt immutabilia. And yet it is true, that if any of theſe had levied a Fine to the King, this had bound, even without the Help of the Statute. And Mary Portington's Caſe, Co. lib. 10. 42. it binds them alſo for the Uſes thereupon declared by their Deed, as being a Part of the Operation of the Fine.

Laws of Nature are Immutable. Poſt. 234.

But note the Reaſon, which is not becauſe the Law binds ſuch Perſons, for therein Jura naturæ ſunt immutabilia ſtill, but clean contrary, becauſe the Law finds them Perſons not ſo diſabled, nor admits the Averment of ſuch Diſablement, becauſe it is certified by invincible and diſputable Credit of the Judge, that they were perfect and able Perſons. And ſo here is a Law of Policy that doth not cancel the Law of Nature, but doth only bound it in point of Form and Circumſtance, it being better to admit a Miſchief in Particular, even againſt the Law of Nature, than an Inconvenience in General; and it is not the Law of Nature to admit any improbable Surmiſe againſt Authentick Record or Evedence. And though it be true, that the Age of 21 is not ſet for Grant by the Law of Nature; yet becauſe that it is by the Law of the Land ſet as the Term and Period, that the Law of Nature judgeth of Diſability of Minors, to give or grant; all Statutes of this Land ſhall be judged equally in the Favour of Minors, even to that Age, in Imitation of the Common Law, except in ſpecial Caſes, ſecundum quid, as an Infant to contract for meer Neceſſities, and the Age of 14 for their

their in Soccage, and the Age of 12 and 14, for Marriage of Male and Female, and the like.

So then it is apparent that it is no Argument, that becauſe theſe might, by their Grants to the King, have bound themſelves ſome way, that is to ſay by Fine, that therefore by what way ſoever it was done, this Statute ſhould make it good. Even ſo I ſay of a Woman Covert, the Law of Nature hath put her under the Obedience of her Husband, and hath ſubmitted her Will to his, which the Law follows, Cui ipſa in vita ſua contradicere non potuit, and therefore will not bind her by her Act joining with her Husband, becauſe they are judged his Acts and not hers, ſo ſhe wants Free Will, as the the others want Judgment.

7 E. 4. 14. b. 15. the Wife being ceſtuy que uſe, ſhe and her Husband ſold the Land, ſhe received the Money, and they both required the Feoffee to make Eſtate to the Vendee; and yet ſhe, after her Husband's Death was relieved againſt the Feoffee, and might alſo againſt the Vendee, if he were privy to the Uſe. 1 Ro. R. 219. 1 Ro. 376.

Yet note, that this was in a Court of Equity, which judgeth ſecundum æquum & bonum. Note, a Conflict of two Laws, of Nature and Equity as it were, but the one is predominant. And yet the Law of the Land for Neceſſity's ſake, of Commerce and the like, by a Law of Policy, makes bold with this Law of Nature in a ſpecial kind; and therefore allows a Fine levied by the Husband and the Wife, becauſe ſhe is examined of her Free Will judicially by an Authentical Perſon truſted by the Law and by the King's Writ, and ſo taken in a ſort as a ſole Woman, as alſo when ſhe comes in by Receit: But this being but a Fiction of Law muſt not be extended beyond that, that the Law hath granted as a Privilege. 10 Co. 43. a.

Nay more, if a Woman Covert levy Fine alone, as if ſhe were ſole, this ſhall bind her for the Reaſon before given, that ſhe ſhall not be received to ſay ſhe was Covert, though her Husband ſhall; and may enter and reſtore the Land himſelf and his Wife both, 17 E. 3. 52. 7 H. 4. 23. a. Co. lib. 7. fol. 8. Counteſs of Bedford's Caſe. 10 Co. 49. a.

But no Man will ſay, that if a Woman Covert would, without her Husband, make a Writing of her Land to the King, and acknowledge and inrol it, that this would be made good by either of theſe Laws, becauſe it would be good by her Fine, if her Husband impugn it not; even ſo the Reaſon holds not in the other Caſe.

By the Cuſtom of ſome Cities and Places, an Infant of 15 Years (for in pleading, an Age certain muſt be ſet down, and not left upon telling Twelve Pence, or meaſuring a Yard of Cloth, as ſome Books are, that the Court may judge it an Age of Diſcretion; for Cuſtom muſt not deprive the Law of Nature) may make a Feoffment of his Land lying there, 6 E. 3. 4. 13 E. 3. Fitz. dum fuit infra ætatem 3. Cuſtomary Law. Co. L. 45. b. Departure, Br. 10.

But if ſuch an Infant would make a Grant to the King by Deed inrolled, this Statute would not make it good: So if the Man and his Wife paſs the Wife's Land in London, and ſhe be examined (Note, for elſe the Cuſtom were void in Law) it binds her by the Cuſtom of London. But if they would Grant their Land to the King by Deed inrolled in the Chancery, this Statute would not make it good. 11 Co. 77. a. 2 C. 364

For, where an Act is made good by Cuſtom, if that be not purſued, it is all one, as if there were no Cuſtom.

To conclude, as this Statute doth not confirm a Grant made of that, that is not the Grantors to give, ſo theſe weak Perſons are Owners of the Lands to hold and retain to themſelves, but are eſteemed in Law, as not Owners to give them away. And therefore it was a needleſs Explanation in the Statute of Wills, that Idiots and the like, ſhould not be enabled to deviſe.

But of a Grant by Tenant in Tail to the King, the Reaſon is otherwiſe; for there is no Inſufficiency in reſpect of natural Defect, but a Reſtraint by a Statute, where the Common Law did enable. 11 Co. 78. a.

The Objection that was inferred out of the Saving of the Statute, where Wives were excepted, that therefore they were meant to be bound, moves

me nothing. For (beſides, that is a weak implicit and indirect Inference to let in ſo great an Abſurdity and Incongruity of Law) that Exception doth not reach unto the Wives that are Parties, that is, to ſuch as joyn in the Grant of their own Eſtates, but to the Wives of the Parties to the Grants, that is, having nothing, but of Wives Title of Dower, which being a ſmall Thing, and caſual, they were content not to free the King's Eſtate of; the Words are (other than the Parties, their Heirs) and Wives. So they put the Wife in Rank with the Heir.

Now then if this Conſideration be faulty, as concerning the Wife, it will be clear, that the King's Grant will be wholly void: For, though the Conſideration conſiſts of divers Things; yet it is one entire Conſideration; the King conceiving that he had the whole Eſtate both of the Wife and Huſband, wherein he is deceived, and taking that for his Recompence, is not ſatisfied without the whole, like unto an Exchange.

11 Co. 27, 28. If a Leaſe or Obligation were read to an unlearned Man, as under a Condition precedent thus: If I. S. and his Wife convey unto you their Eſtate, then you leaſe unto them this Land, or are bound, and indeed, the Leaſe or Bond is only if the Husband alone do it: This Leaſe or Bond will be void. Note, that a Conſideration void in Part, is void in all, M. 15 Jac. Rot. 755. C. B. Swayne's Caſe. The Wife being Tenant for Life, the King, in Conſideration that ſhe had ſurrendred Totum ſtatum, granted a new Eſtate to her: Judged void, becauſe the Eſtate was not totally ſurrendred [illegible] againſt her.

Ante. 203, 204.

Now the ſecond great Point is thus, admitting that the Grant to the King were either touching the Wife utterly inſufficient, or the Grant by the Husband not ſo compleat at the Time of the Grant made by the King, as it could verifie and make good the Conſideration, and that Conſequently the King was prejudiced and really deceived, and ſo his Grant were clearly void by the Rule of the Common Law, whether it be not made good by Force of theſe Statutes, or one of them; and by which, though the Conſideration were totally and really False, as this is not.

And I hold that this Grant is made good, not by the Statute of 34. But I hold it clearly good by the Statute of 31. Not by 34. Becauſe it cures but certain ſpecial Faults, as Miſ-recital, Non-recital, Miſ-naming, and the like, whereof a faulty or falſe Conſideration is none.

Now touching the Statute of 31. I muſt remove certain Objections, without which I cannot bring this Caſe within the Relief of this Statute.

Firſt, it hath been objected, that this Statute is not a general Law in this Part: For though it be confeſſed, that the Purview of this Law that makes Grants to the King good, becauſe it is for the Benefit of the King, is general, as in the Lord Barkeley's Caſe, and the Prince's Caſe, becauſe the Prince cenſetur una perſona cum Rege: Yet the Purview, that makes the Grants by the King good, being to his Diſadvantage, ſhall not have the Honour of general Notice, which is given to the Laws that advance the King's good, for the general Intereſt that all the People have in him, and in his Rights.

Another Objection was, that the Statute did only extend to Monaſtery Lands, and this Parſonage and Advowſon of Horley is neither pleaded nor found to be ſuch.

Syd. 24. ſeveral Iſſue, Br. 8. And to the firſt, I grant that one Chapter of an Act of Parliament may be both general and particular, becauſe one Chapter may contain divers Acts and Laws, which may be as ſeveral and ſundry in their Natures, as if they were in ſeveral Chapters. As it is reſolved in Dive and Maningham's Caſe, upon the Statute of 23 H. 6. And therefore you may plead inter alia inactitatum fuit, which you cannot plead in Caſe of Recovery, becauſe it is one intire Body of Record, ariſing upon one Original, and ending with one Judgment, which neither is nor can be divided.

Dy. 103. b. Plo. 65. a. 105. a.

Ant. 24. 10 Co. 53. b. And the Caſe of the Chancellor and Scholars of Oxford is good in this Point. For, though the Statute of 3 Jac. be general againſt Recuſants, and namely

namely in that Point, which diſables them to preſent; yet the Clauſe that gives their Preſentations to the Univerſities reſpectively is ſpecial, and muſt be pleaded or found, or elſe the Court is not to take knowledge of it: And it is true, that this Part of this Statute gives the Monaſteries to the King, is one Law, and that other Part, that makes good Grants, to and from the King, is meerly another Stat. (as it were) and the two Savings for the Duke of Norfolk and the Lord Cobham in this Act, of 31 Henry the 8. chap. 13. are particular.

But I hold both theſe Purviews of Grants to be general, in as much as they both concern the King in giving and taking, which are Relatives, and the Honour and Juſtice of the King, in performing really the Intents of his Grant, doth as much concern him and his People, as doth his Profit in receiving and enjoying Grants from them. And this Diſtinction, as it is without Warrant, ſo it is too mechanical, and ſavours more of a Merchant than a King.

As to the Caſe that hath been cited 2 & 3 Ph. & M. Dyer, 129. between Ibgrave and Heydon, where in Aſſiſe Iſſue was taken, whether Lands were contained in Letters Patents or not, which by the Common Law were not contained; but by the Statute of 4 H. 8. were contained. The Juſtice of Aſſiſe would not ſuffer that Statute, being not pleaded, to be given in Evidence to the Jury, whereupon they found, that the Land was not contain- Hereupon an Attaint was brought, and the Court would not ſuffer that Statute to be given in Evidence to the Grand Jury, which was not given in Evidence to the Petty Jury. 1 Ro. 285. Dy. 53, 129. b. 212. a.

Upon this Caſe I hold, that the Juſtices of Aſſiſe did Err in denying the Statute to be given in Evidence: For though it be true, that the Court neither need nor can take knowledge of any particular Statute, except they be pleaded: For the Allegata to the Court muſt alſo be Recordata, yet a Jury may and muſt take knowledge of any particular Record, either Patent, Stat. or Judgment, if it be given in Evidence to them, for that is their Allegata verbally alledged and produced, if it make to the Iſſue. But it ſeems they are miſled by Error of the old Books, that held, a Jury could not find Matter of Record: Even as the like Error was ancient, that a ſpecial Verdict could not be found, but upon a general Iſſue, and if this were a ſpecial Statute, then the Judges did juſtly refuſe the Evidence of it to the Grand Jury as of any other Evidence of Fact or Record not given to the Petty Jury. *Allegata & probata*, to the Judge or Jury differ. 1 Leo. 206. Plowd. 411. 1 Inſt. 227. b. Dy. 118 284. 9 Co. 12. b. 1 And. 37. Plo. 92. a.

But if it were a general Law, yet the Judges did diſcreetly and cautelouſly to bar it to be given in Evidence to the Grand Jury, becauſe it was not juſt to attaint the Petit Jury by that, that by the Diſcretion of the Court was concealed from them: But legally it will be hard to quit a Jury that finds againſt the Law, either Common Law, or general Statute Law, whereof all Men were to take knowledge, and whereupon Verdict is to be given, whether any Evidence be given to them or not. As if a Feoffment or Deviſe were made to one imperpetuum, and the Jury ſhould find errors either an Eſtate for Life, or in Fee-ſimple againſt the Law, they ſhould be ſubject to an Attaint, though no Man informed them what the Law was in that Caſe. Vaugh. 150. Accord.

As to the ſecond Objection, that this Part of the Statute concerns only Grants made by the King touching Monaſtery Lands, and therefore remedies not this Caſe. I anſwer it two ways.

Firſt, that the Statute extends to all Lands granted by the King. Next, that this doth ſufficiently appear to the Court to be Monaſtery Land.

For the firſt, though this Proviſion be in the great Statute of Monaſteries (for ſo it is) which gives Colour to the Objection, yet the Clauſe to the King is clearly of Grants of all kinds of Land to him, and obtained of divers and ſundry Perſons: And therefore the other Clauſe ought in Reaſon to be as large.

And that other Clauſe for the Grants to the Subject is alſo clearly general, and hath no reſtrictive Concluſion to Monaſteries, as hath 1 E. 6. chap. 44. of Chanteries, which is expreſly to Grants, to and from the King, of

thoſe kind of Poſſeſſions only, and therefore obſerve all theſe Parts of the Statute 31 H. 8. as to this Purpoſe.

The Grants to be perfected are ſaid to be under the Great Seal, Dutchy Seal, and Seal of the Court of Augmentations; which laſt Seal was by the Statute the proper Seal for theſe Lands.

It names Honours, Caſtles, &c. which were Poſſeſſions of Monaſteries. And it hath general Words of Hereditaments of what Kind, Nature, or Quality ſoever. Again, it hath Proviſion againſt want of finding of Offices, which are not requiſite in Monaſtery Lands by this Statute, which gives them to the King in real Poſſeſſion, &c.

My ſecond Anſwer is, that though the Jury find not, as Part of their Verdict, the Land to belong to Monaſteries, yet they find the King's Patent, which ſays, that it was Part of the Poſſeſſion of the Monaſtery of Chertſey, and that is ſufficient, as in Harper's Caſe, Co. lib. 11. 25. And if it were ſo, it muſt come on the other Side, as there of the Wife or Kinſman ſo called in the Covenant to raiſe Uſes.

Ant. 124.

Now the laſt and greateſt Queſtion (after Objections removed) is this; whether a Grant made by the King by Letters Patents of Lands upon a Conſideration real, which is paſſed before the Patents and is falſe, be made good by the Law of 31 H. 8. chap. 13.

And I am of Opinion that it is, and for this Purpoſe this Statute is to be conſidered in it ſelf, and by Conference with other Statutes of the ſame kind, tending to Confirmation of Patents.

1. Firſt, the general Purpoſe of this Statute was to eſtabliſh Monaſteries in the King by Act of Parliament, howſoever they came to him by other Means, as by Diſſolving, Suppreſſing, Renouncing, Relinquiſhing, Forfeiture or Surrender, or by any other Means, &c. or other unperfect or queſtionable Means.

2. Nextly, the Law did eſtabliſh them in the Crown, and gives actual Poſſeſſion, accompanied with all Liberties, Privileges, Diſcharges of Tythes, and the like Exemptions, Immunities, and other Endowments whatſoever, even ſuch as were ſo Peculiar and Perſonal, as would elſe have periſhed with their Body, to which they were firſt appropriate, as Appropriations of Benefices, and the like.

This Care was to make the Lands of Monaſteries to be the more deſired of the Subject, which was the King's Purpoſe to invite all Men to take of them, and to lay a Bait of Riches and Commodiouſneſs upon them; but this was only to bring them well to the Crown.

3. Now the next Care was to bring them from the Crown to the Subject, with as much Security as was poſſible, and that Proviſion is couched in this Clauſe, and is performed in large and ample Words, ſavouring of a great deal of Bounty and Royal Meaning to the Subject, wherein there is one particular of his Favour to the Subject beyond that, that is granted to the King in the ſame Caſe; which is this.

4. The Statute makes good the Grants to the King, only paſſed before the Parliament, and ſince the fourth of February, in the 27 Year of the King.

But on the other Side, the King's Grants to the Subjects are made good; not only thoſe that were paſſed within the ſame Time, but alſo thoſe that ſhould be made within three Years next after; which makes an Argument of great Force, upon all Parts of theſe Purviews, that the Parliament intended no leſs, but rather more Extenſion of Favour upon the Words and Clauſes to the Benefit of the Subject, than of the King.

5. Next, this is a Law of Equality between the King and the Subject, and therefore it is to be ſuppoſed to be carried as in an even Ballance of Accompt where the Words are equal, and therefore, as on the King's Part it is provided, that the King ſhall enjoy the Lands by him obtained, notwithſtanding Miſ-recital, or Miſ-naming, or Non-recital, or Non-naming, &c. and concludes (or any other Matter or Clauſe whatſoever in any wiſe notwithſtanding.)

6. So

6. So for the Behoof of the Subject the Clauſe is penned with as general Words and Clauſes, and rather to more Advantage to the Subject.

For whereas on the King's Part the Recital is only of the Things obtained by the King, either for Money paid, or for Land, or other Recompence given in Satisfaction, &c.

On the Part of the Subject it is recited Gifts of his Majeſty's moſt abundant Grace and Goodneſs, as otherwiſe upon divers and ſundry Conſiderations, ſo free Gifts are as well ſtrengthened as Sales.

7. And again, where on the King's Part the particular Faults are contained in the very Body of the Purview for the King to be cured, though it have alſo a general Concluſion, as I have ſaid.

On the Part of the Subject there are no ſpecial Faults mentioned in the Purview for the Cure, neither doth the Recital rely only upon particular Defects in the King's Grants, but ſaith [for the avoiding of the King's Letters Patents, and the Contents of the ſame, many Queſtions might be moved or invented, as well for Mis-recital, Non-recital, lack of Inquiſitions, whereby the King's Title ought to have been found;] and then hath this general Clauſe [and for divers and ſundry other Suggeſtions and Surmiſes, &c.] albeit the Words in Effect contained in the ſaid Letters Patents, be according to the true Intent and Meaning of his moſt Royal Majeſty.

Then is the Purview grounded upon a meer general Clauſe, that the Letters Patents of any Honours, &c. (which muſt be alſo underſtood and the Grants therein contained) ſhall ſtand and be good, effectual, and available in Law to all Reſpects, Purpoſes, Conſtructions, and Intents, againſt his Majeſty, his Heirs and Succeſſors, without any other Licence, Diſpenſations, or Toleration of the King, &c. or of any other Perſons, &c. for any Thing contained, or to be contained in them. Any Cauſe (note, not ſuch Cauſes) Conſideration, or Thing material, to the Contrary in any wiſe notwithſtanding.

And then hath a Saving of the Rights of all Perſons, other than the King, his Heirs and Succeſſors, the Governors, Donors, Founders and Patrons, their Heirs and Succeſſors; ſo here you have all the Subſtance of this Statute, which is indeed in this Part an Erection of a Law of natural Equity concerning Grants, whereof the Power and Act of transferring Things from one to another, is Juris Naturalis. But the Forms and Manners to be obſerved in the Transferring of them, are Juris Poſitivi & Civilis, that is, Kingdoms and Commonwealths have by a Law, written or unwritten, entertained ſeveral Forms which are there made Part of the Subſtance of the Grant, though ſtill having Reſpect to the Inſtitution of natural Equity, they are not material but formal; the very Matter and Subſtance of every Grant being nothing elſe but a Declaration of the Owners Will, to transfer that that is his to another: So the ſupplying of the Defects of theſe Forms was the End and Purpoſe of this Statute.

Of this kind are all thoſe which I will recite, which I call Prerogative Forms, which are only regarded in the King's Grant for Defence againſt Abuſe and Deceit, which in the like Caſe of a Subject are not neceſſary.

Of this ſort are Non-recital and Miſ-recital of Leaſes, which in the King's Caſe is made a Fault, becauſe the Law requires not only that the King be not miſ-informed and deceived, but alſo that he be truly and throughly informed of the Eſtate that he grants: And this may be remedied by a Non obſtante, the Non-recital, or Miſ-recital, as it is well reſolved in Bozoun's Caſe, Co. lib. 4. 35. and common Experience teacheth. For indeed it is a meer legal Prerogative Formality. 1 Cr. 198. Patent Br. 109.

There are other Prerogative Forms (for they take no Effect between Subjects) that are of more Importance, and therefore may be ſaid in ſome ſort material, though in reſpect of the Grant they are not paſt the very Eſſence of it, as untrue Suggeſtions and untrue Conſiderations paſt. False Suggeſtions and Conſiderations not cured by *Non obſtante*, but by this Statute of 31 H. 8.

As if the King do grant the Manor of S. reciting it to the Value of Twenty Pounds, or to have come to him by Attainder, or to be concealed where

where it is of the Value of Forty Pounds, or come to him by Purchase, that is void by the Law of the Realm, and is not holpen by a Non obstante, so this Case of false Consideration by the Common Law, would have made a Grant void against the King: But neither of these Faults would make the Grant of a Subject void, as will a Deceit in Reading or Writing to an ignorant Man amiss: For that proves expressly his Will not to concur with the Act, which the Law of Nature requires.

1 Co. 198. See Legat's Case, Co. lib. 10. 111. Barwick's Case, lib. 5. 93. and 18 Eliz. Dyer, 351. Dav. 40. a.

So these being Forms of Prerogatives, I hold them clearly supplied by the Meaning of this Statute, the rather because they are within the very Words of the Law.

For first (as I have said) the Law doth establish free Gifts without Consideration, so that Consideration was no main requisite Respect in the Statute.

Next it mentioneth Grants made for divers and sundry Considerations, and establisheth them all, notwithstanding any Cause, Consideration, or Thing material in any wise.

So here you have the Fault that may be in a Consideration in the King's Grant, remembred and cured: And in Grants of Abby Lands, the Consideration was most ordinary, part Money, part Land.

Now the Consideration that is remedied must be first taken, a Consideration expressed, not omitted out of the Patent; for if the King will make a simple Grant without any Consideration, that is clearly good, Alton Wood's Case. A Consideration shall not be extended beyond the Letter. Coke [illegible] 1. 42.

5 Co. 94. a. Plo. 445. a.

Next, the Considerations that are usually in the King's Grants, are many of them not material, whether they be true or false, if they be past, as for Service done, or Money paid (as before is said.) These therefore cannot be the Considerations meant: For it had been in vain to make a Statute to mend that that was no Fault before.

It must therefore be understood of material and important Considerations, such as is this, especially since the Word (Material) follows in general, which argues all Things in the Clause to be taken of the like Nature.

Next, these Considerations material must be false, for if they be true and just, they need no Statute to make the Grant good. So thus it appears, that the Consideration meant in this Statute must be material, and expressed in the Patent, and in Deceit of the King.

The same I hold in the Case of false Suggestions material, that they are also cured upon the same Reason, under the Words [any Clause or Thing material to the Contrary in any wise notwithstanding] the rather also because the very Word (Suggestion) is used in the Statute. And I am of Opinion, that a Grant by the King, of Lands under any of his Seals mentioned in the Statute, is made good by this Statute, though the Seal be unproper for that Land: For the Words are, that the King's Grant under any of those Seals shall be good, according to their Meaning against the King, &c. notwithstanding any material, &c. Doctor Alkin's Case was, that H. 8. bargained and sold unto the Manor of, &c. and all his Lands in by Indenture, and by the same Indenture covenanted to convey the same unto him by Letters Patents; in Performance whereof, he made his Letters Patents of the Manor, but omitted the Clause of all the Lands in the Towns; and yet it was adjudged, that those Lands passed by the Indenture and the help of this Statute.

What Faults a *Non obstante* in the King's Patent will not carry.

And these are Faults that a Non obstante, any false Consideration, or false Suggestion could not have holpen, and therefore required the Strength of a Statute, and the Benefit was of small Moment, and not worth a Statute, that a Non obstante (which is denied to no Man, and is in the Power of the Attorney-General) could help.

Now this Statute hath expressly remedied some Faults that a Non obstante could not have holpen, as namely lack of an Office or Inquisition, whereby the King's Title should be found, which is a marvelous strong Case. For there are two kinds of Offices, the one of intitling, which this Stat. speaks

speaks of, whereby the King's Title is found, and before which, though the King have a Title, yet the Land is still the Subjects, as where the King's Tenant is attainted of Felony or of Treason, at the making of this Statute of 31 (for it was 33 H. 8 that gave the King actual Possession upon Attainder of Treason) 9 H. 7. 2 Plo. Com. 477. Nicholas's Case. Cok lib. 5. Page's Case. So here for the Benefit of the Grantee by this Stat. that is made the King's, to grant that was not his for himself to retain. Like unto the Provision of 1 R. 3. of Feoffments by cestuy que use, to give that which indeed himself had not; the other Office is but to survey, and know what the King already hath. Post. 345. Plo. 483. 5 Co. 52. a

And to conclude, Note, that the Statute meant to bind the King absolutely, for it makes the Grants good against him, his Heirs and Successors, and in the Saving, excludes them as fully as it doth the Abbots and Priors, and the Founders, Patrons, &c. which the Stat. did utterly exclude out of all Hope.

Yet are there Cases, that may seem within the Words of this Law, that are not within the Remedy: And therefore though I have delivered my Opinion, that Considerations material, that are False, shall not vitiate a Grant if they be past: Yet if a Consideration be prescribed in the Future, and be not performed, it will avoid the Grant, this Statute notwithstanding.

As if the King should grant his Mano^r of D. to I. S. in Consideration that he should within one Year convey unto the King the Mano^r of Sale. Nay more, if it be in Consideration that he shall serve the King in any Office, or that he shall pay unto him an Hundred Pounds, though these Considerations in time Past had done no hurt (as is said) yet in the Future they are made material, and are out of the Meaning of this Stat. which only makes good the Grant, according to the Word contained in it.

For this, Wroth's Case, Plow. 21 E. 4. 40. agrees, that if it be a Consideration of Service past, it is good, and needs no Averment, eo quod est libera capella, but if it be eo quod relaxavit, it is otherwise, for that is for his Advantage. Plo. 455 a.

And so Temp. H. 8. Br. Nov. C. 368. the King gives Land pro electione Collegii, & 38 H. 6. 34. Grant by the King ad effectum, makes a Condition in the Future, and that stands with the Grant, and allows it good and perfect at the first, but after forfeit by the Condition, and therefore out of the Reason and Meaning of this Statute. Co. L. 204.

On the other Side, by the Words of the Clause of Grants to the King, not naming of the Honours, &c. is reckoned among the Faults that should be cured. And yet I hold that clear not remedied generally: For that were not only against natural Equity, but against Sense, to make that pass that was never mentioned, and to suppose a Meaning without Words, or perhaps against Words, were an unsufferable Mischief: And the Makers of the Stat. find themselves intangled with this Mischief, and therefore in a kind of implied Contradiction conclude expressly against it: For they say, that the Grant shall be good notwithstanding, not naming of any of the Honours, &c. comprised and mentioned in the Grant. So it must be mentioned, and therefore cannot be unnamed. Also the Words are for the Things contained, so the not naming cannot stand.

Now to understand it not named, that is, not particularised, is vain: For if the King grant all his Lands and Tenements in D. it is good without Quantity or Quality, 30 H. 8. B. Pat. 95. so it is indeed but an Overflow of Words either not possible, or fruitless.

Again, I am of Opinion, that a Grant of the Mano^r of D. to the King, or by him habend. cum Sale, is void for S. so a Grant to one in perpetuum gives not Fee by his Statute: For, though there be a Meaning in the Latter Case and Words in the former, yet neither are perfect and certain, nor proper to make a Grant, for Sale is not granted. And so it is not a naming in Effect, and the Statute saith, Albeit the Words, &c. so it requires sensible and effectual Words and Sentences. And touching the other Case, the Favour of a Devise is peculiar to that kind of Conveyance. Post. 244. Ant. 161. 2 Ro. 65. 3 Cr. 58, 903. Co. L. 7.

Now

Now the Conference of latter Statutes of Confirmations of Patents and Grants, to and from the King, will make the Bounty and Liberality of this Statute to Subject more evident and perspicuous; for this Statute being found too large against the King, the Statute after made to that Purpose for Confirmations, went in Diminution and Abatement as to the Benefit of the Subject, being pared and still going less in latter Times, as Pardons in Parliament also do, against the King.

And therefore 34 Henry the 8. though it have a general Clause of all Clauses and Matters for the King; yet for the Subject, it concludes only upon the special Faults particularly set down.

The Statute 1 Edw. 6. of Chanteries, the other Statute 1 Edw. the 6. of Confirmations; though it be in one Point strange (for it cures only Grants made by the King; and not to the King) yet it doth not confirm the Grants by the King; but for the special Fault the Statutes 4 & 5 P. & M. 18. & 43 Elizabeth, have a general Conclusion for the Crown; but for the Subject they extend only to particular Faults. But 18 & 43 Eliz. expressly, that they shall be taken with a beneficial Construction. And these three latter Statutes do extend their Benefit and Favour to Grants made only to the King himself (as the rest did) but also to Grants made unto others to the King's Use.

Replevin.

(295) Heard *versus* Baskervile.
Mich. 12 Jac. Rot. 650.

Brownlow. Devon. Mesme Case. Hutt. 15, 19. Winch. Ent. 1045. Mo. 885. Cofinage, Br. 8.

William Heard brought a Replevin against Richard Baskervile the Defendant, as Bayliff to John Dinham Esquire, cognovit captionem, for he saith, that long before, &c. one Thorne was seised of the Place, &c. in Fee, and 12 E. 2. granted a Rent of two Shillings, with a Clause of Distress, unto one Millington: And that he died seised, after whose Death the Rent descended unto another Millington, as his Cousin and Heir, without shewing how his Cousin; and then shews, that the latter Millington 21 H. 8. did grant unto one Dinham and his Heirs the said Rent in Exchange; which was executed on both Sides. And then conveys the Rent down by Descent unto Dinham, in whose Right, &c. upon which Conusans the Plaintiff demurred generally.

6 Co. 5. a. Dy. 79. Plo. 42. b.

And the only Question whereupon the Court stood was, whether the not setting down of the Manner of Cousenage, were Matter of Substance, or only of Form, such as by the Statute of Demurrers 27 Eliz. c. 5. ought to be particularly set down, or else no Advantage to be taken of it.

This Case as being of great Consequence in the Rule, was argued by the Judges publickly, and adjudged for the Defendant, Warburton only dissenting.

In this Case all the Parts of the Statute were considered, the Title is for the Furtherance of Justice; that is Justice final and definitive, which ends the Controversie by deciding it, according to the very Right. For every several Action, or Suit, hath a kind of Justice which may be called interlocutory, in which a Man may fail, though his Right be good, as for want of Form before this Stat. which bred much Charge and Multiplicity of Suits, and was also a Hinderance of that definitive Justice, which this Statute intends to further.

Now the Moderation of this Stat. is such, that it doth not utterly reject Form: For, that were a Dishonour to the Law, and to make it in Effect no Art: But requires only that it be discovered and not used as a secret Snare to intrap. And that Discovery must not be confused and obscure, but special, therefore it is not sufficient to say, that the Demurrer is for Form, but he must express what is the Point, and Specialty of Form, that he requires. And so is the Word and Meaning of the Stat.

1 Lutw. 4.

Demurrer general what shall be Form, what Substance.

Now then, the main Question is, what is Matter and what is Form, within the Meaning of the Law? The Stat. best expresseth it self in this, for it divideth it self into two main Members, which are membra dividentia.

First, Want or Imperfection of Form.

Second,

Second, The Matter in Law or very Right, ſcil. the true, meer, or very Right; to which muſt be added that which the Statute adds, that this Right according to which Judgment is to to be given, muſt appear to the Court within the Body of the Record. Co. L. 12. a.

So now whatſoever it is without which the Right doth ſufficiently appear to the Court, it is Form within this Law: And ſo e converſo whatſoever is wanting or imperfect, by Reaſon whereof the Right appears not, is not remedied as Form within this Law. 3 Cr. 217.

And therefore if an Executor or Adminiſtrator bring an Action of Debt, and do not produce his Probate or Adminiſtration, it is not holpen. Monſtrans Br. 82. 2 Cr. 172, 613. Buls. 200. Cr. Jac. 299, 409, 412. Syder. R. 98, 249. Hob. 38, 233. Cr. El. 551, 592. Pal. 173. Yelv. 201. 2 Cr. 673.

So if a Man plead a Conveyance of a Rent, or the like, that cannot paſs without Deed; without producing the Deed in Plea, it is not holpen: For is not enough for the Party, to ſay that he is Executor, or that Rent was granted to him; but the Court muſt ſee and adjudge of it, or elſe the Right appears not, and the adverſe Party may cauſe the Deed to be inrolled, which makes it a Part of the Plea, whereupon the Court ſhall judge whether it maintain the Plea or not.

So if the Means be wanting whereby the Right ſhould be made to appear, it is uncurable: As if a Man bring an Action of Debt upon an Obligation, and produce it, but ſay it be made beyond Sea, or in no Place, a general Demurrer ſerves. And for the ſame Reaſon two Affirmatives without a Traverſe is not holpen, becauſe it admits no Trial, without which the Court cannot ſee the Right. Poſt 307. Accord. Iiev. Br. 16. 3 Cr. 755. 2 Cr. 317. Co. L. 261. b. Cr. Jac. 76.

If a Man bring an Action upon an Obligation to perform an Award, the Defendant pleads no Award made, the Plaintiff replies and ſhews the Award: Now here is a full Iſſue, a Negative and an Affirmative: Yet if the Plaintiff doth not alſo aſſign the Breach, the Defendant may demur generally, yet that Breach was not traverſable, but the Plea as between the Parties hath an Iſſue before. And this is but an Excreſcence or Surpluſage. But yet becauſe it doth not appear to the Court that he had Right or Cauſe of Action without it, it is Matter, and not Form, to ſet it forth for Information of the Court. And this is a Caſe of ſome Singularity upon this Statute. Ant. 198. 2 Cr. 227. 3 Cr. 320. Dy. 13. 218. Yelv. 153. Syd. 290.

But now to the Caſe in Queſtion, the Deſcent to Millington, as Couſin and Heir, is the Subſtance and Body of the Plea: And the reſt which is required under, viz. is but a Specification and Explication of the ſame Thing by Manner how it is, which is not the Point iſſuable, but the general Deſcent as it is ruled in the Caſe of Challenge for Couſinage, 14 Eliz. Dyer 319. 9 E. 4. 3. & 19 H. 8. 7. and Note that this is Matter of Fact to be tried by Jury, whether it were pleaded generally or ſpecially: So it is not like the Caſes of not ſhewing Deeds, or the like, whereof we ſpeak before, whereupon the Court is to judge.

Note Wimbiſh and Talboys's Caſe, Plo. Wimbiſh and his Wife plead, That ſhe was the Perſon to whom the Intereſt of the Land did belong, after Elizabeth Talboys; and the Opinion of the Court was equal, whether that were well or not: Yet that was at the Common Law before this Statute, but indeed the Plea followed the Words of the Stat. 11 H. 7. which were in the General; whereupon they replied, that maintained the Plea, and that was leſs certain than this, for ſhe might be next either by Deſcent or Purchaſe, or by Reverſion or Rem. Plo. 42. b.

Now where it was objected by Warburton, that if the Pedegree had been ſet down, the Plaintiff might have pleaded a Releaſe of any of thoſe Anceſtors, or pleaded Baſtardy in any of them: It was anſwered, that the Traverſe of the Deſcent of the Rent to Millington muſt have been the Iſſue in both Caſes, and would have ſerved, and ſo will, though the Pedegree be not ſet down.

Note, That as a Demurrer at the Common Law did confeſs all Matters formally pleaded; ſo now by the Statute, a general Demurrer doth confeſs all Matters pleaded, though unformally, according to the Forms meant by this Law. For ſuch Forms are now not material, not being expreſſed in the Demurrer. 2 Cr. 161. Dy. 89. 3 Cr. 469.

Waſte. (296) Lord Darcy *verſus* Askwith.

Hill. 15 Jacobi.

Meſme ca. Hurt. 19. Ro. 2. 823. Winch. Entr. 1165. 22 H. 6. 18. 5 Co. 12. Brownlow. Ebor.

General Words will not give Leave to ſell Timber.

JOhn Lord Darcy brought an Action of Waſte againſt Robert Askwith and John Marſhall, upon a Leaſe made by one Edward North to one Arthur Denly, 34 H. 8. of the Manor of Swillington, and had general Words, Boſcis, boſcorum venditionibus, magno maeremio, magnis Arboribus, mineris carbonum, &c. in tam amplis modo &. &c. prout the Leſſor habuit vel jure habere potuit, for the Term of 80 Years, and conveyed the Reverſion to the Plaintiff, and the Leaſe to the Defendant, and then aſſigned Waſte in felling of Oaks. The Defendants plead that they felled thoſe Trees for the making of Punchions, Coxes, Rolls, Roll-ſcops, and other Utenſils in and about certain Coal-Mines, Parcel of the Demiſe; and without which they could not dig, and get the Coals out of the Pits, and did beſtow the ſame Trees accordingly, whereupon the Plaintiff demurred in Law.

Moo. 831. Accord.

11 Co. 48. a.

2 Cro. 170, 190. 2 Roll. 60.

16 Co. 42. b. Ant. 224.

5 Co. 12. Co. L. 54. b. Dy. 77. 2 Roll. ab. 815. Co. L. 53. 6 Co. L. 43. b.

2 Leo. 174 Accord.

Co. Lit. uncore ceo eſt 42. a. W. [illegible] Inſt. 53. a.

And firſt, there was no Queſtion made, that the Leſſees might fell Timber, by Force of the general Words, becauſe thoſe Words are concluded under a Term, which argues that it gives not the Trees, as it is reſolved 2 Eliz. Dyer 180. And 23 Eliz Dyer 374. But the only Queſtion was, whether by Implication of the Law, by leaſing the Coal-Mines, the Leſſor gave Power to fell the Trees for the Uſe of the Coal-Mines. For the Grounds was agreed tempore E. 1 F. Grants 41. that the Grant of a Thing did carry all Things included, without which the Thing granted cannot be had. But this Caſe was adjudged by the Court una voce, againſt the Defendant, for that Ground is to be underſtood of Things incident and direaly neceſſary. Thus, if I give you the Fiſh in my Waters, you may fiſh with Nets, but you may not cut the Banks to lay the Water dry. If I grant or reſerve Woods, it implies a Liberty to take and carry them away. So the Law that allows a Fine levied by an Infant, allows him likewiſe to declare the Uſes; but in the principal Caſe it was firſt agreed, that this ſhall be taken for a Mine opened ſince the Leaſe, becauſe that is ſtrongeſt againſt the Defendant that pleads it. Now then if Mines had not been granted by ſpecial Name, it had been Waſte to open a Mine of new. For, it is generally true, that the Leſſee hath no Power to change the Nature of the Thing demiſed; he cannot turn Meadow into Arable, nor ſtub a Wood to make it Paſture, 20 H. 6. 1. nor dry up an antient Pool or Piſcary, 5 R. 2. Waſt. 97. nor ſuffer Ground to be ſurrounded, nor decay the Pale of Park: For then it ceaſeth to be a Park, nor he may not deſtroy or drive away the Stock or Breed of any Thing, becauſe it diſherits and takes away the Perpetuity of Succeſſion, as Villains, Fiſh, Deer, young Spring of Woods, the like; but he may better a Thing in the ſame Kind, as by digging a Meadow, to make a Drain or Sewer to carry away Water.

A Leſſee may build a new Houſe where none was before, but that muſt be every Way at his own Charge: For he muſt neither take Timber or other Things waſtable, neither to build nor repair it, though it be never ſo needful. And yet if he keep it not in Repair, an Action of Waſte lies, though the Writ be in Domibus dimiſſis, 42 E. 3. 22. 17 E. 2. 17 E. 3 Fitz. Waſt. 118. 101. And 11 H. 4. 34. But if the Leſſor builds a Houſe after the Leaſe, the Leſſee is not bound to keep it in Repair, 49 E. 3. 1.

Now upon the like Reaſon, though it were no Waſte to open a Mine in this Caſe, as it would have been if the Demiſe had not been of Mines by ſpecial Name; yet it is like a Houſe new built; for Maintenance whereof, the Leſſee can fell no Timber, and ſo much worſe, as a new Houſe betters and increaſeth the Inheritance, whereas the making and digging of Mines decays, and perhaps deſtroys the Inheritance of the Mine. And therefore it is againſt Reaſon to make one Waſte to maintain another. And ſo the Difference is apparent between this Caſe and the Liberties inclusive of House-bot, Fair-bot, Hedge-bot, and the like, which all tend to thr Preſervation of the Thing demiſed, and Plough-bot depends upon the Favour of Tillage. This

was the Judgment and Reaſon of this Caſe, which I did deliver at the Requeſt of the reſt of the Judges for us all.

And I am of the ſame Opinion, though the Mine had been open at the Time of the Leaſe, and though both Leſſor and Leſſee had uſed to take Timber for thoſe Purpoſes: For the Leſſor might uſe his own as pleaſed him, and the Wrong of one Leſſee cannot warrant another's Wrong.

(297) Vicars and Langham. Error.

A Writ of Error was brought in the Exchequer-Chamber, upon a Judgment given in Exchequer between Vicars and Langham, and the Error aſſigned was, that the Sheriffs of London having returned a Jury, and they being called, and ſome not appearing, the Defendant pray'd a Tales: And after the Jury made full by Tales, then the Plaintiff challenged the whole Pannel by Exception to the Sheriffs; whereupon the Jury was quaſhed, and a new Jury impanelled by the Coroners; by which the Cauſe was tried.

Jenk. Cent. 310. Challenge may be taken to the Pannel made by the Sheriff, after a Tales prayed unto him.

Now the Exception was, That the Plaintiff having pray'd a Tales to the Sheriffs and obtained it, was eſtopped to challenge the Pannel for Exception to the Sheriffs.

Eſtoppel binds not where it is inforced by Neceſſity.

But it was reſolved, That there could be no Challenge neither to the Pannel, nor to the Poll, till firſt there were a full Jury; ſo that the Jury not appearing full, there was a Neceſſity to have a Tales, or elſe the Challenge could not have been taken: And ſo the Cauſe would have remained pro defectu Juratorum, if that the Plaintiff had not pray'd it, for the Defendant would not, and ſo the Judgment was affirmed.

And Note, that in this Caſe there were none ſworn before the Challenge, but only impannelled. But if the principal Pannel do once appear full, then the Challenge muſt be taken to the Pannel before any be ſworn, or elſe it comes too late.

Note that where the Plaintiff ſues his Ven. fac. to the Sheriff, he is not eſtopped thereby, to challenge the Pannel for Kindred or other Cauſe that was before the Ven. fac. And though a Juror may be challenged for a Cauſe happened ſince he was ſworn, yet the the Pannel cannot be ſo; for no ill Affection of the Sheriff, ariſing ſince the Jury ſworn, can make the Jury ſuſpected, that was impanelled before.

(298)

IT was adjudged, that where one had a Common appurtenant to ten Acres of Land for all his Beaſts, levant and couchant upon the ſame, and ſold part of it, That the Common ſhould be apportion'd, and every one ſhould have Common for his Beaſts, levant and couchant upon his Part: For, there are Things entire in leveral Degrees, ſome that cannot be divided by any Act of the Parties, as Warranty, Conditions, and ſuch other, which yet by Act in Law are divided. But the Caſe of Common is not ſo ſtrict an Entirety, and the Miſchief of Generality of the Caſe requires an Extention for the common Good.

Common Appurtenants ſhall be apportioned upon Diviſion of Land. Winch. Entr. 1071, or 1074. 1 Cr. 422, 151. Noy 30. Co. L. 122. a. 4 Co. 38. a. 8 Co. 79. a. utr. Ant. 25. 4 Co. 37, 38. a. 2 Co. 15. Confer pag. 25. [illegible]

(299) Counteſs of Shrewsburie's Caſe. Star-Chamber.

IN the Star-Chamber the Counteſs of Shrewsbury, Dowager of Earl Gilbert was fined ten thouſand Pounds, and committed to the Tower for that, being called to the Council Table, and interrogated what ſhe knew, or had heard, or thought of a ſuppoſed Child which was rumoured that the Lady Arbella ſhould have had, ſhe refuſed obſtinately to make any Anſwer, for it was judged that this was a Queſtion of State; for there is not one Thing that doth more concern the Peace of a Kingdom than the Certainty of the Royal Line, inſomuch as ſuppoſititious Perſons have raiſed as great Commotions and Troubles in States, as the Diſcords of true Heirs and Deſcendants. As in the Caſe of Perkin Warbeck, here at Home; and counterfeit Sebaſtian of Portugal, and many others. And ſo this was an Examination

Star-Chamber puniſheth Refuſal to anſwer to the Council in Queſtion of State. 12 Co. 95.

mination proper for the Council-Table, and of their Jurisdiction and Cognisance, and therefore to deny to satisfy the King and State in a Point wherein they are so nearly interested, is to deny a Part of Allegiance, which requires all Duties that tend to the Good and Preservation of the State; and that no less for the future than to present Time. This Lady was the more pressed to answer this Matter, because being more familiar and inward with the Lady Arabella, than any other, she must needs have falsified the Rumour, for all Men of Understanding held it to be untrue.

(300) Traske's Case.

Star-Chamber punisheth Factions and Conventicles, though they be upon Grounds of Heresy and Schism.

IN the Star-Chamber likewise, one John Traske, a Minister, that held Opinion that the Jewish Sabbath ought to be observed, and not ours, and that we ought to abstain from all manner of Swines Flesh: Being examined upon these Things, he confessed that he had divulged these Opinions, and had laboured to bring as many to his Opinion as he could. And had also written a Letter to the King, wherein he did seem to tax his Majesty of Hypocrisie, and did expressly inveigh against the Bishops, High Commissioners, as bloody and cruel in their Proceedings against him, and a Papal Clergy.

Now he being called Ore tenus, was sentenced to Fine and Imprisonment, not for holding those Opinions, (for those were examinable in the Ecclesiastical Courts, and not here) but for making of Conventicles and Factions by that Means, which may tend to Sedition and Commotion, and for scandalizing the King, the Bishops and the Clergy.

Star-chamber.

(301) Countess of Exeter *versus* Lady Rosse.

Term. Mich. An. 16 Jac.

What Examinations bind in the Star-Chamber.

IN the Star-Chamber, in the great Cause between the Countess of Exeter, the Lady Rosse and others, because the Lady Rosse and one Sarah Swarton her Maid, had charged the Countess of Exeter, that she had delivered unto the said Lady Rosse at Wimbleton at the Earl's House, in a certain Chamber there, a Paper written and signed by her self, (as she said) containing a Confession of certain foul Faults, and a Submission thereupon, which was shewed unto the King. His Majesty commanded Serjeant Crew, and Serjeant Moore of Counsel of either Side, to go to Wimbleton, and there in the same Chamber, to examine the Lady Rosse and Swarton, upon all such Things as upon their View of the Place, they might judge likely to discover the Truth or Falshood of the same Matter; which they did accordingly without Oath. Now the same Persons being afterward examined in Court as Defendants, upon all Things that the Plaintiffs listed; they did further examine them upon Interrogatories, whether that Declaration which they had made at Wimbleton before the two Serjeants were true or not, but they did not shew them that Declaration now, whereupon they answered that they were true.

Now upon Motion in open Court, it was resolved that these Examinations were not well taken, for no Man is bound by an Examination in Court, till first he have advisedly read, perused and corrected it, as he sees Cause, and then finally concluded it. Therefore this being first taken without Oath, there was no Reason to bind them to it by a new Oath by Memory without Review, and therefore by Order it was suppressed. Nevertheless because it was like that the said Examination might serve the better to discover Truth; it was ordered that the same their Declarations should be shewed them, and they re-examined upon them. And so they were.

(302) Philip L. Stanhop Plaintiff, the Biſhop of Lincoln. Miles Williams and James Adamſon Defendants in Quare Imped.

Quare Imped.

Brownlow. Lincoln.

Paſch. 14 Jac. Rot. 1030.

THE Plaintiff declared, that the Prior of Shelford was ſeiſed of the Moiety of the Advowſon of two Parts of the Church of Rippingale, and one Sir John Denham of the other Moiety, to preſent by Turns.

That the Church being full of one Brerely, the Prior with Conſent, &c. did grant the next Avoidance unto Bryan Higden. Then he ſhews the Diſſolution of the Priory, being under two hundred Pounds per Annum by the Stat. 27 H. 8. whereby the Priory is given to H. 8. and all Advowſons, Rights, Entries and Conditions belonging to the Priory, as largely as the Prior had them; and that H. 8 granted the Priory, the ſaid Moiety of the Advowſon and all Advowſons, and Hereditaments unto Sir Michael Stanhop and his Wife, and to the Heirs Males of his Body, in as large and ample Manner and Form as they came or ought to come, &c. to the King by the Stat.

That Brerely the Incumbent died, and one Margaret Brerely (to whom the next Avoidance was come) preſented Robert Colingwood, the elder, who died, and then Lyſter who had the Advowſon under Denham, preſented Robert Colingwood the younger, and he dying: Now the L. Stanhope being Heir Male preſented and the Defendants diſturbed.

James Adamſon, as Parſon imparſonee of the Preſentation of Williams, after ſome Proteſtation for Plea, ſaith that King H. 1. Non conc. præfato Michaeli Stanhop & Annæ uxori ejus præd' duar' partium Eccleſiæ præd' modo & forma prout, &c. whereupon they are at Iſſue.

The Jury find that Henry late Prior of the late diſſolved Priory of the bleſſed Mary of Shelford, was ſeiſed of the Advowſon of the two Parts of the Church of Rippingale, to preſent in every other Turn in the Right of the Prior, ut de uno groſſo in feodo, &c

And that one Sir Henry Gray Knight was ſeiſed of the other Moiety of the Advowſon of the ſame two Parts of the Church aforeſaid; that is to ſay, to preſent to the ſame Church aforeſaid, in every other Turn being void, ut de uno groſſo feodo, &c. And that the Church became void, and that the aforeſaid Prior preſented Rob Ednam to his Turn, in the Time of R. 3. who was admitted, &c.

And that the Church became void by Reſignation of Rob. Ednam; by Reaſon whereof Henry Gray preſented in his Turn one Tho. Dixon, his Clerk, who was admitted in tempore H. 7.

And that predict Prior, 6 Aprilis, 21 H. 8. granted unto Brian Higden, &c. The firſt and next Advowſon of the ſaid two Parts of the Church aforeſaid: By Force whereof the ſaid Brian Higden was poſſeſſed, and the Church became void by the Death of Thomas Dixon.

And that 25 H. 8. James Foljambe, having no Right, &c. by Uſurpation upon the ſaid Brian Higden, &c. preſented Edward Brerely his Clerk, who was admitted, 25 H. 8. and continued Parſon of the ſaid Church until the Time of Q. M.

And the ſaid Edw. Brerely being Parſon, and Brian Higden, &c. being poſſeſſed of the ſaid Advowſon for the firſt Avoidance thereof, de jure & de titulo, And the aforeſaid Prior being ſeiſed, &c. of his ſaid Moiety of the Advowſon of the ſaid two Parts of the ſaid Church ſive de jure aut titulo prout Lex poſtulat.

Then the Stat. 27 H. 8. for the Diſſolution of religious Houſes, not having Land to the Value of two hundred Pounds per Annum, gave the ſaid religious Houſes, & Jura ingreſſus, conditiones, &c. to the Monaſteries belonging to the King, and find that Shelford had not above two hundred Pounds per Annum, by Reaſon whereof the King was ſeiſed prout Lex poſtulat.

Winch, Entr. 825. or 831.

The Leſſee of a Prior ſuffers an Uſurpation, the Priory is diſſolved the King grants the Advowſon.

This Argument was Mic. 16 Jac.

And

And afterwards King H. 8. by his Letters Patents dated 5 February anno 31 regni ſui, granted the Manor of Shelford, with the Appurtenants and all Rectories, Tithes and Hereditaments in Rippingale and other Places to the ſaid late Monaſtery belonging in as ample Manner and Form, as they came, or ought to come to the King by the ſaid Stat. excepting the Advowſons of the Vicarages of Churches, whatſoever of the Premiſes not appropriate, to hold to them the ſaid Michael Stanhop, and Anne his Wife, and to the Heirs Males of the Body of the ſaid Michael Stanhop; and if upon the whole Matter, &c. quod conc. tunc conceſſit, & ſi non, &c. tunc non conceſſit.

And I am Opinion that this Verdict is againſt the Plaintiff, and ſo he ought to be barred.

For the more clear Carriage and diſtinct Underſtanding of my Opinion in this Caſe, I will make it into three Points.

1 Point. The firſt, Whether the Prior in whoſe Time this Uſurpation upon Higden the Grantee was, or his Succeſſor after him, if the Monaſtery had ſtood, ſhould have had the Advowſon it ſelf, or a Quare Imped. upon the next Avoidance, or muſt have been driven to his Writ of Right to recover it, as the Caſe appears, and as it is found in this Verdict: For if he were driven to his Writ of Right, then the King could neither take nor give this Advowſon.

And as to this Point, I hold the Verdict uncertain, and therefore if there were no other Thing to warrant Judgment, it would require a Ven. fac. de Novo.

2 Point. Secondly, Admitting that the Succeſſor might have had a Quare Imped. yet whether the King upon the Statute of Diſſolutions, may have the ſame Remedy upon the Avoidance; and I think he might.

3 Point. Thirdly, Admitting the King might have had that Remedy by Force of that Statute; Yet whether the Grant of King H. 8. in ſuch Sort and by ſuch Words as it is, doth give the Advowſon or Action for it, to Sir Michael Stanhop, or his Heirs, either by the Common Law or by the Help of the Stat. of 27 or 31 H. 8. of Monaſteries, and I think it doth not give it.

1 Point. As to the firſt great Point, I will conſider the Statute of W. 2. cap. 5. diſtinctly upon three ſimple and ſeveral Points, which fall out directly into this.

First, What Perſons are relievable by it, and what not.

Secondly, In what Caſes, and what not.

Thirdly, In what Manner, and by what Means.

To the First, What Perſons are relievable?

First, Heirs themſelves, and thoſe within Age (upon Uſurpation had upon them) were driven to their Writ of Right before this Statute at the Common Law, as appears firſt by the Statute it ſelf, which is expreſly ſo; and alſo in 31 E. 1 Fitz. Qu. Imp. 186. where the Plaintiff in a Qu. Impedit, counted of a Preſentment in the Time of R. 1. the Defendant being a Prior ſaid, That he and his Predeceſſors had preſented four Perſons laſt. The Plaintiff replied, That they were in the Minority of him and his Anceſtors; and it was adjudged againſt the Plaintiff, becauſe he had no Seiſin, but had ſuffered Uſurpations before the Statute, and yet it was in the Caſe of Deſcent: and ſo the Opinion is clear in the Caſe of 35 H. 6. 60. and Boſwell's Caſe, Co. lib. 6. 49. reſolved.

Dy. 259, 1113. 37 G. 6 Co. 50. b. And therefore, there are no Perſons relieved but thoſe that are Heirs, as in Degree of Heirs, that is, in by Inheritance and Deſcent of the Advowſon wronged; wherein the Words of the Law are full, for it is not penned in the Word of Inheritance: As thus, Whoſoever uſurps upon Advowſon of Inheritance of an Infant, or a Man of full Age, in the Time of a Guardian or Tenant for Life, or the like: Non ſint ita prejudiciales, &c. for the Word of Inheritance in abſtracto is equivocal. For, the Word hæreditas is indifferent, and hath Relation as well ad infra as ad ſupra, as well to the Time deſcending as the Time aſcending. And therefore an Eſtate of Fee-ſimple, that I have purchaſed, is not improperly called my Inheritance, becauſe it may deſcend and be inherited from me, as well as that which I inherit from another, and deſcends to me as Littleton hath it, and for this Reaſon, ſo. 3.

Co. L. 16. a. Lit. Sect. 9.

And ſo the Writ is of the Wife's Purchaſe in her cui in vita quod clamat eſſe jus & hæreditatem ſuam: but the Statute is penned in the Word hæres or hæredes, which is ſingle and cannot be ſtrained, but to that he hath as Heir. And therefore in the Preamble it puts two Caſes.

Firſt, Hæredes infra ætatem exiſtentes per fraudem & negligentiam Cuſtodiam.

The ſecond, Hæredes etiam ſive Majores, ſive Minores per negligentiam vel fraudem 6 Co. 50. a.
of Tenant by Courteſie, Dower, Life, Years or Tail, were many Times diſinherited, or at leaſt put to their Writ of Right, and in Caſe, were altogether diſherited.

Then follows the Purview, which two Branches anſwer the two Branches of the Preamble, Statutum eſt quod hujuſm. preſentationes non ſint hujuſm. rectis hæredibus (ſupply infra ætatem & in cuſtodia exiſtentibus) Aut illis (ſupply hæredibus ſive majoribus ſive minoribus) ad quos poſt mortem aliquorum (ſupply vel terminum annorum, &c. hujuſm. advocationes reverti debent ita prejudiciales quin quotieſcunque aliquis jus non habens tempore hujuſm. cuſtodiarum preſentaverit, (there is your firſt Branch carried through.)

Then follows the ſecond Branch carried through, vel tempore of the Tenant in Dower, Courteſy, Life, Years or Tail, in proxim. vocationem, poſtquam hæredes ad ætatem pervenerint.

There is the firſt Clauſe anſwered again, vel advocatio poſt mortem tenentium in forma pred' hæred' plene ætatis revertetur, habeat ſcil' id' hæres eandem Actionem & recuperationem per brevem Poſſeſſiorium qualem haberet ultimus anteceſſor hujuſm. hæredit.

So you have hæres throughout all Places and Caſes of the Preamble, and in the Purview laid together. And the Strength of the Proviſo is, habeat eandem Actionem, &c. qualem haberet ultimus anteceſſor hujuſmodi hæredis, &c.

Theſe are the verba remedialia vel operativa, the reſt make the Caſes, theſe give the Remedy, and are bounded within the two Words Heirs whoſe Anceſtors had Right to the Advowſon. Alſo no Remedy is given by this Statute but for Heirs, as appears, 1 E. 2. Fitz. Qu Imped. 43. An Abbot Defendant pleaded the laſt Preſentment by himſelf, and the Plaintiff would avoid it being a Woman, becauſe ſhe was then Covert, and alſo within Age: It was anſwered, that ſhe was not remedied by the Statute; becauſe ſhe was not an Heir, but a Purchaſor; whereupon the Court gave Judgment againſt her, becauſe the Statute provided but for the Heir. And ſo the Caſe 35 H. 6. 60. 6 Co. 50.
doth alſo agree, and F. N. B. Aſſiſe of Darrain Preſentment 31. expreſs. And Boſwell's Caſe is full. But 2 E. 3. 11. it is made a Queſtion whether Heir or Purchaſor be within the Law and ſo left. And the Statute (beſides the Letter which is ſo expreſs and conſtant for the Heir by Name) might very well be led by the Reaſon of the Common Law, which gives Age to an Infant 6 Co. 3. b.
Heir, not ſo to a Purchaſor, though he be as unable to defend his Title as the other. And the Reaſon of the Preferment is, becauſe the Heir is in by Act in Law, (and the Law will make good and perfect its own Acts) and the other is in by his own Act, which is left to his own Strength, and can challenge no more but Right, and no Favour, as truſting to it ſelf.

It is nevertheleſs true, that there is another particular Purview made 11 B. 32. a.
for the Relief of Women covert by the Word hæreditas, and not hæres, thus, Hoc idem obſervetur de preſentationibus factis ad Eccleſias de hæreditate Uxoris in tempore quo fuerunt ſub poteſtate Virorum ſuorum, quibus per iſtud Statutum ſubveniatur per remedium ſupradictum.

But becauſe the Word (hæreditas) is indifferent, and the former Purview is made the Rule and Precedent of this (for there is no expreſs Form ſpecial given for them) but hoc idem obſervetur, &c. And per remedium ſupradictum, and there is no Cauſe to reſpect the wife Purchaſor, more than an Heir within Age Purchaſor, therefore this Clauſe is to be underſtood of Wives that are Heirs as well as the other.

And

And if it be objected that the Statute ſpeaks of ſome that were utterly diſherited by ſuch Uſurpations, which cannot be, but in Caſe of a Purchaſor, for elſe a Writ would lie.

I anſwer, That if a Man before this Statute had purchaſed an Advowſon, and before Preſentation had made a Leaſe, and an Uſurpation had been upon the Leſſee, the Heir had been without Remedy; but now by this Statute he may have a Quare Imped. at the next Avoidance after the Leaſe, and may lay the laſt Preſentation in his Father's Grantor. According to the
6 Co. 50, a. Words of the Statute Actionem qualem anteceſſor, &c. For by the Statute, the Uſurpations upon the Leſſee are to be paſſed and counted as none to this Purpoſe.

Now though I hold this Stat. to the Letter in this Caſe of Heir, becauſe the Statute is ſo conſtant in it; and the received Expoſition hath been ſo, yet I allow divers Equities where the Reaſon is the ſame with the Word.

Jones 48. Accord. And therefore for Equities I allow, that Succeſſors are relieved by this Stat. as well as Heirs; but with this Diſtinction, Succeſſors of ſingle Corporations, as Biſhop, Dean, Prior, or the like; and ſo in Brooke, Preſentment 46. and Boſwel's Caſe, and 34 H. 6. 27.

But of complete and compounded Corporations, I hold it contrary, for the ſame Body continues that committed the Laches, which is the Reaſon of the like Difference taken in Croſſe and Howel's Caſe, Plowden, in Caſe of Non-claim upon Fines.

Again, an Heir within Age, I hold relievable as well that is not in Ward, as is in Ward, and though the Uſurpation be upon himſelf, the Advowſon being in his own Hands and not in Leaſe.

Again, if an Infant Heir ſuffer an Uſurpation, and then another Avoidance fall in his Nonage: I hold that he may have his Quare Imped. for that Second, though the Words be poſtquam hæres ad ætatem prevenerit, For that Clauſe was put in to anſwer the particular Caſe of an Heir in Ward, put in the Preamble where the Guardian had ſuffered the Uſurpation, In which Caſe the Statute ſaw that the Ward could have no Title till his full Age. For I hold it clear, that if a Guardian ſuffer an Uſurpation, and then will ſurrender to his Ward, that the Ward ſhall not be relieved at any other Turn during his Nonage, becauſe he ſhall be counted in by the Guardian to this Purpoſe. But if a Guardian in Soccage or his Ward, after fourteen Years of Age, ſuffer an Uſurpation, he ſhall be within the Relief at any other's Turn before twenty-one.

And therefore I deny the Opinion of Thorpe, 16 E. 3. Fitz. Quare Imped. 67. and Brooke 161. For it was the Meaning of this Law, to ſuccour the Weakneſs of an Heir within Age, when he maketh a Fault, but not to inforce him to ſuffer a Wrong.

It is true, that in ſuch Caſe he cannot have a Dum fuit infra ætatem, (for the Incongruity of the Writ) yet in Caſe he may enter. But in the Quare Imped. there will be no Incongruity.

Again, I am of Opinion, that if an Uſurpation be had upon one in ventre ſa mere, that at the next Turn after his Birth, he ſhall be relieved, contrary to the Iſſue taken, 11 E. 3. Fitz. Quare Imped. 158. For ſuppoſe the Heir then in eſſe, being a Daughter, were relievable in reſpect of her Nonage, were it reaſonable that the Son after born (to whom the Wrong is now done) ſhould leeſe that Relief. Beſides this, the ſpecial Purview of this Statute for Prelates to be relieved againſt Uſurpation in the Vacation of their Prelacies is altogether of the ſame Nature and Reaſon.

2 Inſt. 359. Again, a Grantee of the next Avoidance is within the Equity, though he be not a Leſſee for Years, 34 H. 6. A Rem. is within the Stat. as a Reverſion.

A Purchaſor may be within the Law, as if one make a Leaſe for Years, and the Reverſion deſcends to the Heir who grants it away to I. S. and then the Leſſee ſuffers an Uſurpation, and the Leaſe ends. I. S. at the next Turn ſhall have his Quare Imped. for he is in loco hæredis, who was relievable, if he had kept the Reverſion.

In Iſſue in Tail is within the Remedy of this Stat. upon an Uſurpation upon Tenant in Tail, yet there is no Word for him but for the Reverſioner, 43 Ed. 3. 20. 34 H. 6. 27. 46 Aſſ. 4. 6 Co. 50. b. 51. Jones 49. Accord.

Now to the ſecond Point of the firſt great Point, ſcil. in what Caſes the Relief lies for the Heir or Succeſſor.

I hold it firſt clear, that if a Man have an Advowſon by Deſcent, and being of full Age makes a Leaſe of it, upon whom an Uſurpation is made, and then the Leaſe ends; the Heir at the next Avoidance ſhall not have a Quare Imped. for, by making the Leaſe by himſelf, he is Party to the Negligence and Wrong. And the Word (Heirs) throughout the Law imports, that he ſhould be in as Heir of the Reverſion, wronged by the Guardian and other Tenants, which he could not help. N. B. 31. G.

And the laſt Clauſe is more plain, which gives ſuch Action as the Anceſtor ſhould have had before Demiſe, ſo the Demiſe muſt not be made by him that is to be relieved, but by his Anceſtors. Yet 33 H. 6. 12. & 24 H. 6. 27. admit the contrary in pleading, but Fitzh. Natura Brevium 31. C. G. agrees with my Opinion. And though in the new Entries, Quare Impedit 20. 7 Eliz. the Queen made Title to the Church of Aſhton, and declared of an Uſurpation upon the Prior of C. which was ſurrendred to King H. 8. and now the Church voided again, the Defendant pleaded a good Grant of the Advowſon and traverſed the Uſurpation, and ſo left that I accompt no Authority; for the Defendant, having a clear Title by the Grant to avoid the pretended Uſurpation, had no Reaſon to admit it an Uſurpation, as he muſt have done, if he had demurred. But no Man will hold, that if a Biſhop in Poſſeſſion of his Advowſon, ſuffer an Uſurpation, that his Succeſſor ſhall have a Quare Imped. at the next Avoidance: And therefore 7 E. 3. Fitz. Quare Imped. 21. A Prior Defendant avoided a Preſentment, becauſe it was made in Time of Vacation; but the other replied, that it was in the Time of his Predeceſſor, when the Church was full, which was holden ſufficient to put the Prior's Succeſſor from his poſſeſſory Action, or Defence to a Writ of Right. And the Reaſon is plain, that when a Prior or private Perſon ſuffers an Uſurpation, he himſelf is put to a Writ of Right, and then the Succeſſion or Deſcent cannot change it to a Quare Imped. for the Uſurpation had wrought his full Effect, as at the Common Law out of the Relief of the Stat. ſo as the Caſe could never fall within the Remedy of the Stat. after. Jones 47. N. B. 34. M.

And in the great Caſe, 35 H. 6. 62. Dandy and Priſot agree, that if one uſurp upon an Infant that is an Heir, and the Infant come to Age within ſix Months, and remove not the Incumbent by Suit, he is out of the Stat.

Now the third Point of the firſt great Point, how the Stat. works the Remedy, it is not by making the Uſurpation void, and ſo leaving the Poſſeſſion with the Right; but by giving a poſſeſſory Action to recover the Advowſon, which at the Common Law was not Recoverable but by Writ of Right. And therefore the verba remedialia & operativa, are habeat eandem Actionem & recuperationem, per brev. poſſeſſorium, &c. non eadem poſſeſſionem qualem, &c. And it is clear, that if the Uſurpation be upon a Leſſee, though the Reverſion be in an Heir, yet the Leſſee himſelf is without Remedy for ever. 3 Point of the firſt great Point. Hutt. 66.

Now the Uſurper cannot gain a Fee in the Advowſon during the Term, but it muſt be the whole Fee, which cannot return to the Heir upon the Expiration of the Term, without an Act amounting to an Eviction; and therefore 16 E. 3. F. Na. Br. and Boſwel's do all agree, that the Infant in ſuch Caſe cannot grant an Advowſon, becauſe he hath but a Right; and in this Point the Statute hath made no Change, but hath left the Poſſeſſion with the Uſurper, and hath given the Uſurpee a readier Action, and 6 Months Time more than he had. And therefore I am of Opinion, that if a Man uſurp upon me, and his Clerk be inſtituted, he hath gained the Advowſon, though the Clerk die within 6 Months; but if he die ſo, I may have a Quare Imped. or preſent the next Time, becauſe the Plenarty doth not bar my Action 'till the 6 Months incurred by Reaſon of the Stat. But if a Man uſurp upon the King, the King's Preſentation is not taken away 'till Induction, and alſo after Induction, the King may have his Quare Imped. as long as Ant. 140. Dy. 208. 6 Co. 49. b.

6 Co 30. a. 2 Cro. 385. 6 Co. 30. a. Cr. Jac. 53, 124. Yelv. 91. 3 Leo. 61. 3 Cro. 241, 519. 2 Cro. 123. Mo. 338. Ant. 140.

the Uſurper or Incumbent lives; but he cannot remove him without Suit; but at the next Avoidance the King may preſent again: For, though he may be diſpoſſeſſed of his preſent Preſentation, he cannot be ſo of his Advowſon, and therefore he may ſtill grant it, notwithſtanding the Uſurpation, as was judged in a Writ of Error, upon a Judgment given to the Contrary, between the King and Campion, for the Vicarage of Newton Valence.

But a Collation, be it right or wrong, gains no Patronage, as is Green's Caſe and Boſwell's C. l. 6. 29. 50.

Now though the Statute doth but give the poſſeſſory Action, yet I hold clearly, that by the Intent of the Stat. and by the Conſequence, it gives Liberty to preſent alſo upon an Avoidance: For the Tenor of the Quare Imped. which is given quod permittat ipſum preſentare; ſo the Meaning of this Law was to give him a poſſeſſory Action or Preſentment in nature of a Re-entry, like the two Statutes of 32 H. 8. giving the Wife an Entry upon the Husband's Diſcontinuance, and the Diſſeiſſee an Entry upon the Diſſeiſor's Heir.

Now as the rightful Patron may Preſent, ſo I hold clearly, that the Ordinary muſt in this Caſe, as in all others, bear himſelf, that is, to do nothing but as Ordinary.

If the Church be litigious between the Uſurper and the other to award his Jure patronatus, but if he will chooſe the Clerk of either at his Peril, he muſt at his Peril receive him that hath Right by this Statute.

And it is no Defence to ſay, that the Uſurper preſented laſt, for this is no Proof or Colour that he hath Right now: And the Ordinary that is to be indifferent, and for whoſe Safety the Law hath provided the Jure patronatus, muſt not prejudge Rights, but at his Peril.

Out of this Diſcourſe the Concluſion is, that if the Uſurpation upon Higden the Grantee were in the Time of the ſame Abbot, that made the Grant; that then as well that Abbot as his Succeſſor muſt have been put to their Writ of Right, notwithſtanding this Stat. and by Conſequence the Stat. of Monaſteries could not have brought the Writ of Right to the King, nor from the King to Stanhop.

And this Point is found uncertain by the Jury, for the Grant to Higden was 21 H. 8. and the Uſurpation 25 H. 8. and, from the Beginning to the Ending, there is but one Prior named Henry, and ever after it is followed throughout the whole Caſe, pred. Prior & idem Prior, ſo the Preſumption is rather againſt the Plaintiff.

It is true, that if a Man plead a Grant of a next Avoidance from a Prior, he muſt aver his Life, or elſe he ſhall be taken for dead, not out of any thing appearing in the Plea, but out of a Rule in Law, that every Man's Plea ſhall be taken moſt ſtrongly againſt himſelf, becauſe every Man is ſuppoſed to be partial to himſelf, and to make the beſt of his own Caſe. But in a Verdict it is not ſo, for that is and ought to be indifferent to both Parties.

Mo. 201.

Second great Point.

But now to the ſecond great Point, take the Caſe at the beſt, that the Uſurpation upon Higden had been in the Time of a Prior Succeſſor, ſo that he might have a Quare Imped. at the next Avoidance, whether the King ſhall have this Quare Imped. by the Stat. which gives Advocationes, jura, ingreſſus, conditiones, &c.

Actions, Rights and Entries, what are given to the King by the Statute of diſſolution of Monaſteries or Treaſons, or to the L. by Eſchear. 2 Cr. 428, 429.

If a Diſſeiſee die without Heir, or be attainted of Felony, the Lord of whom this Land is holden ſhall have his Right of Entry by Eſcheat, and ſo ſhall the King in a Caſe of Treaſon at the Common Law; not ſo if the Diſſeiſor had died ſeiſed, as is agreed in the Caſe of the Marqueſs of Winchester, Co. lib. 3. fol. 2. becauſe Attainders by Parliament are but Imitations of Attainders at the Common Law, and ſhall be of no other Force, except the Words be ſo expreſs as can admit no Doubt; as where it gives Uſes and Conditions. But the Word (Rights) is ſatisfied in the Rights of Entry, ſo the Word Forfeiture gives but Title, and inveſts no Poſſeſſion.

The King could have no Action againſt the Heir of a Diſſeiſor: Firſt, becauſe he had a Lawful Tenant by Title: Secondly, becauſe he could not recover but by Action, which could not be fitted to the Lord; and therefore, though he might enter upon the Diſſeiſor, yet he could not have an Aſſize upon

upon the Diſſeiſin done to his Tenant, becauſe he could not ſay, that he diſſeiſed him de libero tenemento. 32 H. 8. cap. 33.

Now the Scruple of our Caſe conſiſteth in this, that it participates of both theſe Caſes, and which ſhall be predominant is the Queſtion.

For at the Common Law there had been no Remedy, but a Writ of Right, which the King could not have had by the Statute of Monaſteries and the Stat. of Weſtm. hath changed the Action into a Quare Imped. but hath not otherwiſe changed the Nature or Force of the Uſurpation. And therefore I am of Opinion, that if an Heir relievable by a Quare Imped. upon this Stat. die without Heir, the Lord by Eſcheat ſhall not preſent, nor have a Quare Impedit. The like I hold upon the two Stat. of 32 H. 8. cap. 28, & 34. where the Wife had Entry upon the Diſcontinuance of her Husband, or the Diſſeiſee upon the Heir of the Diſſeiſor. For, though Entry be given in theſe Caſes, yet they are in by Title as they were before. And the Common Law will not extend it ſelf to irregular Entries that are given by ſpecial Stat. differing from the Reaſons of the Common Law. P. 261, 341. Dav. 15. a

But I hold nevertheleſs, that the Stat. of Monaſteries ſhall give this Preſentation to the King, by the Name of Jura & ingreſſus, the King's Preſentation being for this Caſe a kind of Entry or Claim, and ſo he may have a Quare Impedit. For the Writ is proper enough for him, Quod permittat ipſum preſentare for the preſent Diſturbance done to himſelf. Not like the Caſe of an Aſſize of a Wrong done before.

And the ſame I hold upon the ſaid two Statutes, that if a Woman have Cauſe of Entry upon the Diſcontinuance of her Husband, or a Diſſeiſee upon the Heir of the Diſſeiſor, and then attainted of Treaſon, that the King upon the Statute 33 H. 8. of Treaſon, may upon Office ſeiſe thoſe Lands by Force of the Words of that Law, that gives the King all Rights of Entry: Of which ſort this is, and which hath not the Miſchiefs that the Marqueſs of Wincheſter's Caſe ſpeaks of, Privity of Action, and endleſs Vexation upon obſcure Titles. Though it be true, that the Wife will take an Action, it muſt be a Cui in vita at the leaſt, and the Diſſeiſee an Entre ſur diſſeiſin, which the King cannot have, Vide 8 and 16 Eliz. Dyer 252. and 337. A Leaſe made to a Chantry Prieſt not well confirmed, the King and his Patentee ſhall avoid it. Cap. 20. 2 Co. 51. a. 3 Le. 158. 7 Co. 8. a.

Now to the third and laſt great Point, I am of Opinion, that though this Right of Advowſon, and the Preſentation to it, and Action of Quare Imped. for it is to be given to the King: Yet it is not well conveyed from the King to Stanhop. The Reaſon is, that the Uſurper had gained the Advowſon in Poſſeſſion, and hath left in the Prior, and ſo in the King, nothing but a Right, though he be within the Relief of the Stat. of Weſtminſter, which Right cannot be conveyed away by a Subject, and therefore muſt paſs by Prerogative, whereof the Rule is, that nothing of Prerogative can paſs without expreſs and determinate Words, as is reſolved in the Caſe of Mines. Plowd. And therefore it will not paſs by the Word (Advowſon) for it is no Advowſon de facto, nor by the Word (Hæreditament) being a Word doubtful and ambiguous, which ſhall never be taken againſt the King in a ſtrange Senſe, nor by the general Word of (Rights) without a ſpecial Mention and Recital of the particular Right, which is meant to be granted, as was reſolved in Cromer's Caſe, 8 Eliz. cited in Doughtie's Caſe, Co. lib. 3. fol. 11. and there affirmed for Law by the whole Court. In which Caſe of Doughtie's it is alſo judged, that the Statute of Treaſons, which puts the King in actual Poſſeſſion, doth not remove the Poſſeſſion of the Diſſeiſor, but leaves the Right in the King 'till Seiſure. 3 Great Point. Dav. 47. b. Accord. F. 4 b.

Now this Grant of the King hath no ſpecial Grant of this Right, not ſo much as the Word (Jura) in the Nature of naked Rights; for it is but in two Places, the one Maner. de Shelford cum ſuis juribus, which is of another Nature. The other is Jura, Juriſdictiones, Poſſeſſiones, &c. which are alſo another Kind. Now the Stat. of Monaſteries gives to the King, amongſt other Things, Rights, Entries and Conditions; and then enacts, that the King's Patentees ſhall have all Manors, Lands, Entries and Conditions, contained and ſpecified in their Letters Patents, according to their Tenor, and Purport, and Actions, for any Thing therein contained;

and that the King ſhall have the ſame in actual and real Poſſeſſion, ſo that he may grant them without Office, and then it hath a Saving of the Poſſeſſions and Rights of Strangers.

So it is plain, according to the Rule of Doughtie's Caſe, upon the Statute of Treaſons (which is of the ſame Words and Effect) that where the Parſon or Abbot attainted of Treaſon was out of Poſſeſſion, and had but an Entry, that there the King was not to have actual Poſſeſſion of the Land it ſelf, for then it had been in vain to have given him Rights and Entries, and more vain to ſave the Poſſeſſions of Strangers.

Now if the King have nothing but a naked Right, without Poſſeſſion of the Advowſon, it is plain that his Grant extends not to it, as hath been ſaid, neither can it be ſaid to be contained, much leſs ſpecified in the Letters Patents; which Words require ſuch a Specification, as the Law requires in the King's Grants, and therefore if the King ſhould have granted Abbey-lands, with all Mines found or to be found within the ſame, this would not, by the Help of this Statute paſs Mines Royal; for the Tenor and Purport of the Patent doth not import it, no, though the Abbot had had them, and the Grant had been of all Mines in as ample Manner as the Abbot had them. So if the King's Grant had more in the Habendum than in the Premiſes, this Statute would not carry that.

Laſtly, the Iſſue is joined, that the King granted the Advowſon, which is not true, For though it be true, that if the King had granted the Right of the Entry and Action, that the Grantee might have had it, yet ſtill the Grant muſt be pleaded, as it is in Law a Grant of the Right, and not of the Thing it ſelf.

My three Brethren had argued all before, and had concluded for the Plaintiff, but they held (though not all alike) that Reverſioners, as well of full Age as within Age, and as well of their own Leaſe as of the Leaſe of their Anceſtors or Predeceſſors, whoſe Heirs they were, were within the Remedy of the Law, and that the Law preſerved the Poſſeſſion for the Reverſioner (though not for the Leſſee) and ſo made a kind of baſe Fee by Wrong, during the Leaſe in the Uſurper, which was Hutton's Opinion. Things hard and not warranted in my Judgment.

And ſo Judgment was given for the Plaintiff.

False Impriſ. Meſme Ca. Hut. 26. 2 Ro. 576. Bar. Br. 92.

(303) Peter *verſus* Stafford.

Record or not.

GEorge Peter Attorney brought an Action of falſe Impriſonment againſt Sir John Stafford and others, for impriſoning him at Briſtol. The Defendants plead, that Time out of Mind there hath been a Court of Record holden at Briſtol every Monday, &c. before the Mayor, &c. according to the Cuſtom and Liberties of the ſaid City, and that according to the ſaid Cuſtom Sir John Stafford levied a Plaint there againſt the Plaintiff, whereupon the other Defendants, being Serjeants, were commanded to arreſt him, which they did, &c. The Plaintiff took Iſſue, that Sir John Stafford did levy no ſuch Plaint againſt him, prout, and it was found for the Plaintiff. And it was ſaid in Arreſt of Judgment, that it ought to have been tried by the Record. But the Court reſolved, that it was well tried, for the Matter of Record was mixt with the Matter of Fact, that is, whether the Court were kept, and the Plaint levied, according to the Cuſtom and Liberties of the City, which is a Matter of Fact triable per pais: Alſo the Levying of a Plaint is like the Suing out of an Original, which is not of Record 'till it be returned in the Court.

1 Le. 229. 2 Ro. 576. No. 29. 5 Co. 47. b.

And ſo the Plaintiff had Judgment in this Caſe.

Debt.

(304) Eſſington *verſus* Bourcher.

Debt againſt divers Defendants, one alone wageth Law. Meſme Ca. Hut. 26. Brnl. 53 3 Cr. 345, 646.

ESſington againſt Bourcher, Knight, Turner and others, brought an Action of Debt of 1800 l. upon an inſimul computaverunt, and an Arrear of 800 l. whereof all the reſt paid. Bourcher was Outlawed, Turner and the reſt appeared

pared by one Superſedeas: Turner alone tendred his Law, that he with the reſt did not owe, &c. And the others not Outlawed did plead to the Country. And it was objected againſt Turner, that he was not to be admitted to his Law alone, becauſe they were all charged as one Defendant, being for a Joint-debt, and ſo they muſt anſwer together. But it was anſwered, that this was unreaſonable, for ſo by joyning with me as Joint-Defendants, I muſt be ſubject to his Plea, though he would confeſs the Action. Now though the Defendants ſhall not ſever in Dilatories, yet in Bars they may.

And after divers Motions, there were Precedents produced, one in Tr. 12 Jac. Rot. 2226. and another Hill. 13 Jac. Rot. 541. and a third in Hill. 41 Eliz. Rot. 445. where one of the Defendants alone waged his Law, that he and the reſt did now own, and the nihil dicunt & parcatur judicium, 'till the Law made or failed, and after the Law being made, Judgment againſt the Plaintiff. And ſo in this Caſe Turner was received to his Law, and the Plaintiff Non-ſuit. Co. L. 125. b.

(305) Pie *verſus* Weſtly. Information.

Tr. 16 Jac Rot. 1948.

Ple did inform againſt Weſtly Inn-holder, for uttering of Fleſh, 30 Days forbidden. Unde petit adviſamentum Cur. & quod forisfaciat 5 l. for every Offence, unde ipſe petit medietatem. Upon not Guilty, it was found againſt the Defendant; and now it was ſaid in Arreſt of Judgment, that there was a Statute ſcil. that gives 5 l. for an Offence, but then it divides it one third Part to the King, another to the Informer, and the third to the Poor: Et Curia adviſare. But I am of Opinion, that the Information is inſufficient, for an Information hath not only ſomewhat in it of an Indictment to lay down the Offence, but hath alſo the Nature of an Action, for the Party to demand his Due as in another Action, which is his Office to demand certain, and not the Court's to aſſign; therefore if he make no Demand, or Demand that appears not to be due, his Information is inſufficient.

Information muſt conclude with the Demand of the Informer.

(306) Bickford *verſus* Bickford. Caſe.

Trin. 16 Jac. Rot. 843.

Bickford an Adminiſtrator brought an Action of Debt againſt Bickford, and after Iſſue found for the Plaintiff, it was ſpoke by Chibborn in Arreſt, that the Action was brought the 2 of April, 16 Jac. and the Adminiſtration was laid in the Declaration granted the 11 of May after. So the Judgment was ſtayed.

Action falſified of the Plaintiff's ſhewing.

(307) Maſon *verſus* Grafton.

Trin. 16 Jac. Rot. 1725.

Maſon brought an Action of the Caſe againſt Grafton, for Goods imbeſelled out of his Inn, and found for the Plaintiff. In Arreſt it was excepted, that he had not alledged to be in Communi Hoſpitio. (Quære if both in the Writ and Declaration.) Yet becauſe the Declaration laid in the Cuſtom for common Inns, and then laid that he Hoſpitatus in Hoſpitio, the Plaintiff had Judgment. For it ſhall be intended (and it is) Domus, non Hoſpitium, if it be not commune.

Action againſt an Hoſteler not laying *Commune Hoſpitium*. Dyer 266. b. 8 Co. 32. a. ultra. Palm. 523.

Harris

Treſpaſs.

(308) Harris *verſus* Ap-John.

Amendment *de placito deb.* for Treſpaſs. Winch. 10. 1 Roll. 202, 204. 2 Cr. 528. 3 Cr. 258, 622.

Treſpaſs by Harris againſt Ap-John, after Verdict it was found, that the Ven. fac. and Habeas Corpus, was de placito debiti. **And the Court amended it.** 1 Cro. Car. 275, 528. like Caſe.

Obligation.

(309) Holford *verſus* Parker.
Trin. 16 Jac. Rot. 988. in Communi Banco.

Delivered as a Scrole to the Party. 2 Ro. 26. Co. Lit. 36. a. Co. 9. R. 137. a. Thorogood's Ca. Ro. 2. Ab. 26, 27. Cr. Jac. 85. Blunden & Wood's Ca. Moor, 642. Williams & Green's Ca. Cr. El. 884. the ſame Ca. Cr. El. 835. Cont. Noy. 6. Dy. 34. 3 Cr. 520, 884. 1 Brſl. 156.

Debt per Holford verſus Parker ſur Obligation: **The Defendant pleaded, that he delivered the Writings to the Plaintiff himſelf, as a Scrole upon Condition,** &c. Et iſſint nient ſon fait, **and demurred. Judgment againſt the Defendant without Arguments.** 3 Cro. 520. like Judgment.

(310) Conſtable's Caſe.

Action upon the Statute of Hue-and-Cry per Conſtable, verſus homines inhabitantes in dimidio Hundredi de Waltham Apres Verdict fuit accept, **and Precedent there ſhewed of a like Action,** Verſ. inhabitantes in Hundredo de W. communiter vocat. **half Hundred of W. And yet the Court gave Judgment in this Caſe for the Plaintiff. For the Court may well intend it indeed to be a whole Hundred, and ſo but called Half, and it hath indeed an Hundred-Court by it ſelf, and otherwiſe it ſhould have been ſo pleaded or given in Evidence.**

Covenant.

(311) Norton, Executor of James Hobart,
againſt one Molineux *and* Ford.
Hill. 5 Jacobi.

Adminiſtrator during the Minority of the Executor of an Executor, how he ſhall be named. Poſt. 250, 251. Swinb. 287. 3 Cr. 211.

Norton, Executor of James Hobart, brought a Writ of Covenant againſt Molineux **and** Ford, **Adminiſtrators of the Goods** of Thomas Carrel, **during the Minority of** Mary Molineux, **Executrix** of the ſaid Thomas Carrell, **late Executor of** Edward Carrell, **upon a Covenant** of Edward Carrell's for **Payment of an Annuity,** Iſſue non eſt factum; **found for the Plaintiff. It was moved in Arreſt by** Towes, **that the Defendant ſhould have been named Adminiſtrator of the Goods of** Edward, **not adminiſtred by** Thomas. **But the Court being informed by the Prothonotaries, that this was the ancient Form, Judgment was given for the Plaintiff. If the Children had been Defendants, they ſhould have been named but Executors of the Executor, for the reſt follows, but the Committing of Adminiſtration is of both Goods, but the Precedents rule in the Titling,** &c.

Debt.

(312) Leeſe *verſus* Arrowſmith.
Mich. 16 Jac. Rot. 781.

Amendment of the Imparlance-Roll, by the Plea-Roll. Meſme Ca. Hut. 83. Moor, 892. Brownl. 1. R. 53. 1 Cr. 105, 189, 311, 415, 498, 525, 537. Poſt. 251, 284. 1 Cro. 921. Ant. 76. Hetl. 59. Cr. Car. 46, 92. 1 Roll. 198.

Leeſe brought an Action of Debt againſt Arrowſmith, **for 300 l. and in the Imparlance-Roll, the Count was upon the Sale of divers Parcels to ſeveral Sums, all making up but 294 l. But after the Count upon the Plea-Roll was right, and upon** nihil debet, **it was found for the Plaint. And although the Imparlance-Roll could not be amended by the after Roll, yet becauſe** Bayle **the Plaintiff's Attorney affirmed, that his Inſtructions to the Clerk were right, it was amended by the Court.**

(313) Smith *verſus* Pannell.
Mich. 16 Jac. Rot. 716.

Court Eccleſiaſtical medleth not with Railing. Ro. 2d Abr. 286, 296.

Smith and other Church-Wardens of Ridgewell **in** Eſſex, **preſented to the Arch-Deacon, that one** Pannell **was a Railer, and a ſower of Diſcord between Neighbours, whereupon the Arch-Deacon enjoyned him Purgation;** and

and the Court awarded Prohibition, for the Clauſe belongs to the Leet, except it were in the Church, or the like.

(314) Wats *againſt* Conisby. *Court Eccleſiaſt.*

M. 16 Jac.

ELizabeth Wats, Wife of Edward Wats, libelled in the Spiritual Court againſt Jane Conisby, Executrix of the Executor of Henry Conisby, for a Legacy of 160 l. The Defendant pleads, the Releaſe of Wats the Husband after Marriage, and there were two Witneſſes to the Releaſe, but both dead, and therefore not allowed, whereupon Prohibition was granted containing this Averment, that the Witneſſes were dead, and that ſhe offered to prove by Witneſſes, that it was the Hands of the Witneſſes dead, and that Wats the Husband confeſſed, that he ſubſcribed the Releaſe.

Court Eccleſiaſtical refuſeth competent Proof in Prohibition. Hutt. 22. Meſme Ca. Herl. 14, 134. Diſmes Br. 11. Ant. 188. Mo. 413. Yel. 93, 173. Syd. 161. Cr. Jac. 270 12 Co. 65, 68.

(315) Luch's Caſe. Orphans.

M. 16 Jac.

JOhn Luch was brought to the Bar by Habeas Corpus cum cauſa directed to the Mayor, Aldermen and Sheriffs of London, who certified the Cauſe as followeth; that there hath been a Court of Orphans Time out of Mind in London, and that the Cuſtom hath been, that if any Free man or Free woman die, leaving Orphans within Age unmarried, that they have had the Cuſtody of their Bodies and Goods, and that the Executors and Adminiſtrators have uſed and ought to exhibit true Inventories before them, and if any Debt appears due, to become bound to the Chamberlain, to the Uſe of the Orphans, in a reaſonable Sum, to make a true Account upon Oath of them after they be received, and if they refuſe, to commit them 'till they will become bound; and then ſhews, that one Jane Cutler Widow, being a Freewoman Fiſhmonger, died leaving divers Orphans, and that this Man was Adminiſtrator, and had exhibited an Inventory of 1000 l. Debt unreceived, and was required to give Bond of 2000l. ut ſupra, and refuſed per quod, &c. And it was alledged for the Priſoner, that he was already bound in the Prerogative Court to make Accompt, and ſo he ſhould be twice bound. Alſo that he was informed, that there was no ſuch Cuſtom for Widows of Free-men. But the Court anſwered, that they could not examine the Truth of the Cuſtom, but the Validity of it, and they held it reaſonable enough, if it were true. And if the Eccleſiaſtical Court would impugn a lawful Cuſtom, the Court might grant a Prohibition.

Cuſtom for Executors to give Bond in Court of *Orphans*, as well as in the Eccleſiaſtical Court. Hetley 132. Hutt. 30.

Prohibition to Court Eccleſiaſtical, if they intrude into the Court of *Orphans*. 5 Co. 73. Accord. 1 Syd. 250. Accord. 3 Cr. 346. Hutt. 30.

(316) Scot *verſus* Wall. Prohibition.

Tr. 16 Jac. Rot. 3110.

INter Scot and Wall, the Plaintiff had a Prohibition containing, that where he had 20 Acres of Wheat, and had ſet out the 10 Part of it, that the Defendant pretending that there was a Cuſtom of Tything that the Owner ſhould have 45 Sheaves and the Parſon 5, and ſo ſued for that, where there was no ſuch Cuſtom: For the Court ſaid, that the Modus Decimandi muſt be ſued for in the Eccleſiaſtical Court, as well as the very Tythe, and if it be allowed between the Parties they ſhall proceed there; but if the Cuſtom be denied, it muſt be tried at the Common Law, and if it be found for the Cuſtom, then a Conſultation muſt go, otherwiſe the Prohibition ſtandeth.

Prohibition where the Parſon demands Tythe according to a Cuſtom Hetl. 135. Diſmes Br. 11. 13 Co. 57. Noy. 8. 2 Ro. 28, 34.

Poſt. 286.

Auſtin

(317) Auſtin *verſus* Kirby.

Tr. 16 Jac. Rot. 1915.

Super ſacram. omitted.

AUſtin againſt Kirby, **Falſe Judgment upon a Judgment in the County Court in Treſpaſs, the Jury ſay, that the Defendant eſt culp. leaving out** ſuper ſacramentum ſuum, **and reverſed.**

Debt.

(318) Spray *verſus* Sherrot.

Hill. 12 Jac. Rot. 794.

New Writ againſt the Heir or Executors, as by Journey's Account upon Reverſal of Outlawry. 2 Cro. 588. 6 Co. 10. Cr. Jac. 588, 589, 590.

SPray **againſt** Sherrot, **Debt againſt an Heir who pleaded** riens per diſcentour de, &c. **The Plaintiff pleaded, that heretofore he ſued another Writ of Debt againſt the ſame Heir, upon the ſame Bond in this Court, and the Defendant was Outlawed, which Outlawry, for the Inſufficiency of the Proclamation, was reverſed; and he freſhly brought this Writ, and avers, that the Defendant had Aſſets the Day of the firſt Writ purchaſed. Whereupon the Defendant demurred. The like hath been pleaded againſt the Executor, but no Judgment hath been given in theſe Caſes.**

Annuity.

(319) Smith *verſus* Boucher.

Mich. 16 Jac. Rot. 3339.

Annuity out of clear gains, diſchargeth the Perſon abſolutely. Meſme Caſe, Hutt. 33. 1 Roll. 228. Dav. 5. b.

SMith **brought a Writ of Annuity againſt** Boucher **and others, the Annuity was** 40 l per Annum. ſolvend. extra clara lucra, des les Allom **Works. The Defendant pleaded, that there were no clear Gains; and upon Demurrer, the Plaintiff had Judgment without Argument. For the Grant chargeth the Perſon, and the reſt is Idle.**

Margaret Parkins's **Caſe.**

Prohibition.

(320) Farmer *verſus* Shereman.

Diſmes demanded of Abbey-Lands, entailed before the Statute of 31 Hen. 8. Benl. 143. Hetl. 135. Diſmes Br. 17.

Cr. Jac. 559. Dy. 277. 2 Le. 71.

INter Farmer & Shereman **in Prohibition the Caſe fell out, that an Abbot having a Privilege to be diſcharged of Tythes** quamdiu manibus propriis, **in the Time of E. 4. made a Gift in Tail, and 31 H. 8. the Abbey was diſſolved. The Queſtion was, whether the Donee of the Iſſue ſhould be diſcharged. It ſeemeth clear he ſhall not be diſcharged, for the Statute diſchargeth none; but as the Abbot was diſcharged at the Time of the Diſſolution, ſo they muſt claim the Eſtate and Diſcharge under the Abbot, ſince the Statute, ſo if by a common Recovery the Reverſion had been barred before or after the Statute: But if the Land had returned to the Abbot or King, before or after the Statute, the Caſe had been otherwiſe.**

Prohibition.

(321) Napper *verſus* Seward.

Mich. 16 Jac. Rot. 72. & 672.

Prohibition Eccleſiaſt. Court admitting a Cuſtom of Tything in *perpetuam rei memoriam*. Ro. 2d Ab. 286. Hetly, 130. Br. Diſmes, 11.

NApper **againſt** Seward **a Parſon, had a Prohibition againſt his Pariſhioners, that libelled in the Spiritual Court, to make Proof by Witneſs there of divers Manner of Tything,** in perpetuam rei momoriam. **A ſtrange Attempt.**

Barret's

(322) Barret's Caſe.
Hill. 16 Jac. 5 Caſe.

A Warr. Chartæ was brought by J. S. againſt Barret, and counted upon a Feoffment made by Dedi & conceſſi ad Denham in Norff. Whereas the Land was laid to be in another Town; upon Demurrer this groſs Fault appeared, and was denied to be amended, becauſe it was pleaded without a Serjeant's Hand. No Amendment of a Feoffment of Land falſe laid.

(323) Bird *verſus* Snell. *Ejectione, &c.*
Hill. 16 Jac. Rot. 1819.

Bird brought againſt Snell a Writ containing both an Ejectione firmæ, and a Treſpaſs of Aſſault and Battery, and upon not Guilty pleaded, Verdict was given for the Plaintiff, both for the Ejeament and Battery, and entire Damages aſſeſſed. And the Court adviſed of the Judgment, becauſe it was without Precedent; but the Damages for the Battery could not be releaſed, becauſe they were entire with the Ejectment. Note, it ſeemeth holpen by Verdict. *Ejectione firmæ*, and Treſpaſs of Battery both in one Writ.

( ) Thorp *verſus* Taylor. Obligation.
H. 16 Jac.

Thorp brought an Action of Debt againſt Taylor, and counted upon an Obligation made ultimo die Auguſti, Anno 4. Rs. upon Oyer of the Bond, it bore Date 19 die Aug. Anno 4. the Defendant pleaded non eſt factum. The Jury found it his Deed, and the Plaintiff had Judgment: For the Count was not of the Date, but of the Making, and the Jury have found the Deed. 2 Cro. 136. Count upon the Date and making of the Deed. 2 Co. 5. Ant. 73.

(325) Bradſhaw *verſus* Walker. Caſe.
M. 16 Jac.

Bradſhaw brought an Action upon the Caſe againſt Walker for theſe Words, Thou art a filching Fellow, and didſt filch from William Parſon 100 l. After Verdict for the Plaintiff Cur. adviſare, for the Words are of an uncertain Senſe, and ſo Judgment was pronounced una voce, Mich. 17 Jac. nihil capiat. Action for Words, filching Fellow. Meſme Ca. Hut. 34. 1 Roll. 73. Brownl. 1. R. 13. 3 Cr. 424. Palm. 29.

(326) Marſh *verſus* Sparrey. *Ejectione, &c.*
Hill. 14 Jac. Rot. 1859.

Marſh brought an Ejectment againſt Sparrey, of the Demiſe of Sir George Wrotteſly, and the Plaintiff had Verdict and Judgment. Now it was moved by Hitcham, that the Writ was Deviſit, where it ought to have been Demiſit, and it was amended per curiam. *Deviſit* for *Demiſit*. 1 Roll. 198, 201.

(327) Cuppledick *verſus* Sir Philip Terwhit. *Q. Imped.*
Tr. 16 Jac. Rot. 3210.

Cuppledick brought a Quare Imped. againſt Sir Philip Terwhit & alios qu. permittat ipſum preſentare ad Eccleſiam de Ulcibi, &c. The Defendant pleaded quod nulla talis habetur Eccleſia vocat. Ulcibi in Com. pred. whereupon Iſſue, and after Verdict pro. Def. it was by Harris for the Plaint. that the Ven. fac. was miſtaken: For it was de Vicineto de Ulcibi, where it ſhould have been de corpore Com. as where the Iſſue is upon no ſuch Town: But the Court gave Judgment qd. caſſatur breve, for though it be denied that there is any ſuch Church, yet the Town is not denied, and the Count of Hut. 31. Meſme Ca. Co. L. 125. b. Virdict. 6 Co. 14. *Nulla talis habetur Eccleſia.*

Eccleſia de Ulcibi is an Allegation that there is a Town called Ulcibi, where of whether there be a Church the Viſne ariſeth properly from the Town; and though I obſerved the Iſſue did not meet in Words, for the Writ is Eccleſia de Ulcibi, and the Plea Eccleſia vocat. Ulcibi, yet the Effect is the ſame. And note, that though another of the Defendants, ſcil. Clerke, had pleaded likewiſe to the Writ, no ſuch Biſhop of Lincoln as was named, &c. whereupon there was another Demurrer, yet the whole Writ was abated againſt them all, upon the Verdict, and no Opinion given upon the other Demurrer.

Co. 48. a. Co. L. 125

Information. (328) Pie *verſus* Deane. Mich. 15 Jac.

Stat. 35 Eliz. againſt Inmates, whether in force or no. Meſme Ca. Hut. 35.

PIe informed againſt Deane for turning one Houſe into many Dwellings, upon the Stat. 35 Eliz. the Defendant pleaded not Guilty, and Verdict for the Plaintiff. And Serjeant Harris in Arreſt of Judgment ſaid, that this Stat. was expired: For it was enacted to endure for 7 Years, and afterwards to the End of the Seſſion of Parliament then next enſuing, ſo it determined at the End of the Parliament 43 Eliz. Alſo the Penalty by that Act is given one half to the Church-Warden of the Pariſh where the Offence is, for the Relief of the Poor, to be levied by Diſtreſs, and the other half to the Informer, & Cur. adviſare.

(329) Briers *verſus* Goddard.

Adm. during the Minority of an Executor gives Bond and marrieth. Brownl. 1. R. 31. Swinb. 287. Poſt. 251. 2 Keb. 30. 1 Roll. 923. Carter, R. f. 136. Plo. 186. a. 5 Co. 29. b. 6 Co. 67. b. F. N. B. 121. c. Co. L. 46. b. 5 Co. 36. a.

INnter Briers & Goddard, Adminiſtratrix durante minore ætate of the Daughter Executrix, made divers Obligations unto the Creditors of the Teſtator, and after took Husband. And the Court was of Opinion, that ſo much of the Goods of the Teſtator's as amounted unto the Value of the Debts paid, and undertaken by the Wife, the Husband might retain as his own.

Quære how the Caſe ſhall be if the Wife die, for then the Husband is no longer chargeable by her Bond. Alſo the Court was of Opinion, that this kind of Adminiſtration, during the Minority of an Executrix, was not within the Stat. of 21 H. 8. to be granted of Neceſſity to the Widow of the Teſtator, becauſe there is an Executor all the while, otherwiſe perhaps it were, if the Executor were made from a Time to come.

Prohibition. (330) Hide *verſus* Ellis. Hill. 16 Jac. Rot. 567.

Prohibition for the ſecond Hay, having paid Tythe for the firſt. 1 Ro. 640, 644. Winch Ent. 611. Cr. Car. 403. Mo. 758. 2 Cro. 116. 3 Cro. 660. 2 Inſt. 65. Cr. Jac. 116. 1 Ro. R. 133.

PRohibition for Hide Plaintiff, againſt Ellis, Farmer of the Rectory of Shinfeild in Com. Berk. and preſcribed, that all Tenants, and Occupiers of the Meadow, had uſed to cut the Graſs and ſtrew it abroad called Tedding, and then to gather it into Winreves, and then to put it into graſs Cocks, in equal Parts without Fraud, and then to ſet out every Tenth Cock great or ſmall, to the Parſon, in full Satisfaction, as well of the firſt as of the latter making; upon Traverſe of the Cuſtom, it was found for the Plaintiff. And Exception was taken that the Cuſtom was void, becauſe it contained no more then every Owner ought to do, and ſo no Recompence for the ſecond making: But the Court gave Judgment for the Plaintiff. For Tythe naturally is but the Tenth of the Revenue of my Ground, not of my Labour and Induſtry, where it may be divided, as in Graſs it may, though not in Corn: And in divers Places they ſet out the Tenth Acre of Wood ſtanding, and ſo of Graſs: And ſo here the Jury have found this Form of Tything to be the Cuſtom there, it is well. And the like Judgment was given upon the like Cuſtom in the King's Bench. P. 2 Jac. Rot. 192. or 292. between Hall and Simmonds.

Yelv. 86. Accord.

Noy. 31. 2 Cro. 42, 116.

Philips

(331) Philips *verſus* Wood.
Mich. 16 Jac. Rot. 2099.

Battery.

PHilips brought a Treſpaſs of Aſſault and Battery againſt Wood, and Wood pleaded not Guilty, and it was found for the Plaintiff. And after Verdict it was moved in Arreſt of Judgment, that the Writ was againſt theſe two Defendants and another, and therefore the Count ought to have been in the ſimul cum which was not. Et curia adviſare. But Tr. 17. Judgment was given, but it was taken as no Original, and ſo aided by the Statute.

1 Le. 41. 11 Co. 5. a. Yel. 68. Ant. 164, 199. 5 Co. 37. b.

H. 16 Jac. Rot. 1100. Exitus 1 Cr. 327.

(332) Fetherſtone Haugh *verſus* Topſall.
Hill. 13 Jac. Rot. 715.

Debt.

FEtherſtone Haugh againſt Topſall, Action of Debt againſt the Executor. The Writ was purchaſed in the County of the City of York, and the Declaration upon the Imparlance-Roll was entred, M. 13 Jac. Rot. 3409. And in the Margent Civit. Eborum. But the Declaration was, that the Teſtator, apud Villam Novi Caſtri ſuper Tinam conc. ſe teneri, &c. Whereupon the Defendant imparled uſque Hillar. and the Plaintiff counted again Right, conc. teneri apud Civitatem Eborum, and upon Iſſue plene adminiſtravit, Verdict for the Plaintiff, and Judgment, and after the Record removed by Error, and this Aſſigned for Error in the King's Bench. It was moved in the Common Pleas, that the Imparlance-Roll might be amended and made agreeable to the Original, but was denied by the Court.

No Amendment of the Imparlance-Roll, by the Original Writ. 1 Roll. 199. 1 Brnl. 66. 1 Ro. 198. Hutt. 83. 1 Cr. 46, 91. Ant. 76, 246. Mo. 892.

Cr. Jac. 89, 105, 311, 498, 525, 535.

(333) Carver *verſus* Haſelrig.
Hill. 13 Jac. Rot. 970.

CArver againſt Haſelrig, Adm. durante minore ætate of an Executor, and did not aver that the Executor was ſtill within the Age of 17 Years. Opinion, that he did not; otherwiſe it were if the Plaintiff were ſuch an Adminiſtrator. 2 Cr. 10. 1 Ro. R. 400. Swinb. 287. Yel. 128. 6 Co. 67. b. Yel. 128.

Nonage continuing by whom averred. 2 Ro. R. 209. Benl. 139. 1 Syd. 57. Accord. 2 Cro. 240, 590. Yelv. 128. Accord. 5 Co. 29. a. Ant. 246, 250.

(334) Grimſtone *verſus* Molineux.
Hill. 15 Jac. Rot. 850.

Information.

INformation by Grimſtone againſt Molineux, Knight, and his Wife, for the Recuſancy of the Wife, upon the Stat. of 23 Eliz. the Defendant prayed Judgment of the Information, and pleaded a Stat. of 31 Eliz. that for that Offence, amongſt others, the Action ſhould be brought in the County where the Offence was committed, and avers, that the Wife was inhabiting in Lancaſter at the Time, &c. abſque hoc, &c. in London, whereupon a Demurrer. Vide 21 Jac. 1. Cap. 4.

Note, this Offence is not in Committing, but in Omitting, and Nonfeazans.

London Penal Laws ſuable in their proper Shires, whether Recuſancy be one of them. Poſt. 327. Ant. 184.

(335) Armeſted's Caſe.
Paſch. 17 Jac.

Star-chamber.

SIr Henry Yelverton, Attorney-General, informed in the Star-chamber ore tenus againſt William Armeſted and others, for building without Brick, againſt the Proclamation, though upon old Foundations. And they were all fined to one Year's Value of their Houſes, ſaving one who was fined more, becauſe he had built two Tenements upon the Foundation of one, for that did work as ill an Effect as to one of them, as if he had built that upon a New Foundation.

And it was ſaid, that Proclamations were ſo far juſt, as they were made pro bono publico, for publick Utility, as againſt the Increaſe of Buildings in London, and about it, whereby if they cannot be fed, cleanſed or governed, the Country is diſ-peopled, and Timber conſumed, the City leſs ſtrong and

Breach of Proclamation againſt Building, puniſhed in Star-chamber. 12 Co. 74, 75.

beautiful, and more ſubject to Fire. And in this the King builds upon old Foundations, for he found the like Proclamations and Proceedings upon them in Queen Elizabeth's Time. The Offenders were alſo enjoyned to reform their Buildings according to the Proclamation.

Star-chamber. Poſt. 253.

(336) Lake *verſus* Hatton.

MAſter Secretary Lake exhibited a Bill againſt one Luke Hatton, containing, that Luke Hatton had delivered to Lady Roſſe his Daughter a Writing, importing a Conference had between the Counteſs of Exeter and him, wherein he ſhould determine to give a Dram to Lady Roſſe, and to make away the Secretary her Father, and to charge him with a Plot againſt the King, in the Time of the late Queen; and that this Writing coming to the Secretary's Hand, he required Luke Hatton to confeſs the Delivery of it. He the ſaid Hatton did deny the Delivery of it, and had publiſhed and given out, that he the ſaid Secretary himſelf, or the Lady Roſſe, or ſome other by their Procurement, had deviſed and contrived it themſelves. To this Hatton (being the only Defendant) had anſwered, and denyed the Writing, Deviſing or Delivering it; and denied alſo, that he had at any Time been with the Lady Roſſe. Whereupon many Witneſſes on both Sides were examined; and now the Cauſe, among the reſt, being ready for Hearing, it was excepted by Walter, the Prince's Attorney, that the Bill ought to be caſt out of the Court; and his principal Reaſons were two.

Libel, no Man ſhould complain of it in the Star-chamber, but the Party grieved. 9 Co. 59.

1. First, That the Writing being a Libel againſt the Counteſs of Exeter, and ſo being a Wrong inſeparable to her, no other Perſon could complain of it, having no Intereſt in it: For, perhaps the Party libelled againſt had rather it ſhould die. And cited a Caſe of one Lambe a Civilian of Northamptonſh. whoſe Bill, upon the like Cauſe, was caſt out of the Court for that Part of the Libel that concerned others.

2. The other Exception was, That the Charge was in the Diſjunctive, and ſo uncertain.

Poſt. 268.

Now to the Point of Uncertainty of the Charge, it was agreed by us all, that that Point of the Charge was well, for it was no other than a Report of the Words ſpoken by him, which they muſt deliver truly as he ſpake them.

2 Cro. 635.

And withall, if a Man ſhould ſay of three or four Lords: that they, or one or two of them had committed Treaſon, this were a Scandal, whereof they all, or one of them might complain.

4 Co. 17. b.

But if a Man did complain that two Perſons, or one of them, had forged a Deed, this Charge is naught, becauſe it is his own Declaration, which muſt be certain.

But to the firſt Exception Sir Edward Coke agreed, and relied upon Lambe's Caſe, and added further of his own, with a great deal of Violence, another Reaſon, that the Counteſs of Exeter's Honour and Diſhonour was handled and traverſed between two Strangers, whereunto ſhe was made no Party, which might be turned to a Practice, that a Man might pretend that a baſe Perſon had ſcandalized a third Perſon of Quality, and ſo by that means defame him. But he might have made the Counteſs a Defendant with Hatton, or elſe have joined her againſt Hatton.

To which Exception it was anſwered by me and the Chief Juſtice, that Lambe's was no whit like this: For in that Caſe Lambe had nothing to do with that Libel, more than any other of the People, whereas in this the Secretary was named for a Plot againſt the King, and more, the Libel is found in his Hands, and he charged to be the Contriver of it; ſo that now he is ingaged not ſo much to purſue the Libeller, as to quit himſelf of the Libel, which will cleave to his Fingers, if he find not another Author. And to ſay that he ought to have made the Counteſs Defendant, is againſt Reaſon and Juſtice: Againſt Reaſon, becauſe the Bill lays nothing againſt the Counteſs: And againſt Juſtice, to inforce him to accuſe her of thoſe foul Faults contained in the Writing, whereof perhaps he holds her innocent,

Ant. 215.

and

and therefore hath no Word in his Bill to charge her: And to make his Intention more clear, he had moved before the King, that the Counteſs would have joined with him in his Suit againſt Luke Hatton, and it was refuſed.

And where Sir Edward Coke had ſaid, that if it had been true, that the Counteſs of Exeter had a Purpoſe to Poiſon, &c. that Hatton might have juſtified the Writing, I denyed it: For a Libel, though the Contents be true, is not to be juſtified. But to diſcover it legally to ſome Magiſtrate or other, that may have Cognizance of the Cauſe, is the right way; but it may be juſtified in an Action upon the Caſe. Poſt. 337.

Libel puniſhed though the Contents be true. 5 Co. 125.

(337) Breadman *and* Coales.

BReadman was bound in a Stat. of 2000 l. to one Coales, who dying inteſtate, the Adminiſtration was committed to his Wife, who married one Fawne, which Fawne became bound with others to the King in 600 l. and then he and his Wife did by Deed, inrolled in the Court of Wards, aſſign this Statute unto the King for Payment of the ſaid Debt of 600 l. to the King, which was payable at certain Days after the Aſſignment: And we reſolved, that this Aſſignment was good, notwithſtanding the Statute of 7 Jac. which makes Aſſignment of Debts void, other than ſuch as did grow due Originally to the King's Debtor bona fide; for the Purpoſe of the Law was, that no Debtor of the King ſhould procure another Man's Debt to be aſſigned, which was a common Practice; but this is Fawne's own Debt, though not to his own Uſe, which he may himſelf releaſe and diſcharge, and by the ſame Reaſon may aſſign.

2 Cr. 524. Ant. 5. 5 Co. 89. b. Co. L. 232. a. Yel. 68. 6 Co. 45. b.
Choſe in Action, Br. 4. fait enrol, Br. 6. C. Wards.
2 Cro. 524.

Aſſignment of a Debt to the King, good. Cr. Jac. 180, 524. Ow. 2.

(338) Waddington's Caſe.

THe Words of the Writ of Diem Clauſit extremum, to the Eſcheator are, Quod per Sacramentum proborum hominum diligenter inquiras & inquiſitionem inde diſtincte & aperte factam nobis in Cancellaria noſtra, ſub ſigillo tuo & ſigillis eorum per quos facta fuerit ſine dilatione mittas, &c. In the Concluſion of the Office it is thus: In cujus rei teſtimonium tam eſcaetor. predict. quam Jurat. predict. huic inquiſitioni ſigilla ſua alternatim appoſuerunt.

C. Wards.

It was excepted, that alternatim did import interchangeably, and that ſo it ſhould not be underſtood that both Eſcheators and Jurors ſhould ſeal to one.

Parol Alternation.

But we reſolved it was well enough becauſe it is ſaid, tam Eſcaetor quam Jur. And it may well be true, that all did ſeal, and then the Adding of the Word alternatim, which muſt not be ſo curiouſly conſtrued, but may be taken to both Parts of the Inquiſition, ſhall not hurt.

(339) Lake *verſus* Hatton.

SIr Thomas Lake, Principal Secretary, brought a Bill in Star chamber againſt Luke Hatton, Servant to the E. of Exeter, ſuppoſing that he delivered to his Daughter, the Lady Roſſe, a Writing, purporting that the Counteſs of Exeter had a Purpoſe to poiſon both the Lady Roſſe and the Plaintiff, and ſome other Scandals of the Counteſs, and now denied it and ſaid, that they had forged it. After which Cauſe publiſhed and ready for Hearing, it was moved by Serjeant Crew, Sir John Walter, and others, that this Bill ought to be rejected, becauſe this being in effect a Libel againſt the Counteſs, no other could complain of it, except perhaps the King's Attorney, according to the like Rule given in this Court, in the Caſe of Doctor Lambe.

Star-chamber. 5 Caſe. Ant. 252.

This was long and vehemently debated, and at laſt voted by the Court. And Sir Edward Coke leading was of Opinion, that there was no more of

of the Bill to be heard, but the Proof that Hatton had charged the Plaintiff with the Libel, as being that whereby he was grieved. But I shewed, that in this Case Sir Thomas Lake did not complain of the Libel as on the behalf of the Countess for the Wrong done to her, but to charge Hatton with the Delivery of it, to discharge himself, Who was otherwise answerable for it, as being found in his Hand.

And so after by the Vote of all the Lords, the Bill was retained, and first heard according to the Priority of exhibiting of it.

Also in the Cases which were three, whereas Witnesses are examined on Part of the Bill upon Letters and Exhibits, which they suffered not to remain in the Office, but took them again into their keeping, all those Dispositions were refused, for where they are deposed, they are Part of the Deposition, and therefore ought to remain in Court as their Acts, whereas being kept in the private Hands of Parties, they may be altered and corrupted after the Examination, and so not sufficient to ground a Sentence upon.

(340) Duncombe *versus* Wingfield.
Tr. 15 Jac. Rot. 988.

Winch. Ent. 408, 409. Waller Hartf.

" GEorge Melton and Alice his Wife were seised of Land in Question in Fee, " in the right of Alice, and levied a Fine with Proclamations 42 of Eliz. " of it to the Use of them two, and the Heirs of their two Bodies begotten, " the Rem. to Susan Andrews, the Lessor for Life, the Rem. to Francis Duncome in Tail, the Rem. in Fee to the same Alice; and the Jury found the " Seisin accordingly by the Stat. of Uses, and that the Tenements were in

This Argument was Mic. 15 Jac.

" the actual Possession of George and Alice, and that Melton alone, Mense " Michael 44 Eliz levied another Fine with Proclamations of the same " Lands, to the Use of the same Melton and his Wife, in special Tail as " before, the Rem. to Melton himself in Tail, the Rem. to the same George " Melton, and one Evan Melton in Fee; and then the Jury found that they " were seised by Force of this Fine, and the Act of Uses prout lex, &c.

" And then they further find, that the same George Melton and Alice his " Wife, being so seised and in actual Possession thereof, Alice died 14 No- " vem. 44. Eliz. without Issue, and that one John Duncombe is her Heir, " George Melton continued his Possession, and was seised prout lex, &c. And " that he so seised 1 Febr. 45 Eliz. did for Money bargain and sell the Tene- " ments unto Curtis and Stephenson, and their Heirs, and set down the In- " denture in hæc verba, wherein it is appointed that there shall be a Reco- " very against them, and that it shall be to the Use of Melton and his Heirs, " but no Inrollment is found, neither is it concluded that Curtis and Ste- " phenson were seised by Force of this Bargain and Sale, not so much as " prout lex, &c. But then they proceed and find, that one John Colt and Hol- " land 23 of January 45 Eliz. did prosecute a Writ of Entry in the Post, a- " gainst Curtis and Stephenson, being then Tenants of the Free-hold of the " same Land, retor. cr. pur. and then set forth the Whole Common Recovery, " wherein George Melton was called to Warranty with the Execution. And " that the same Recovery was to the Use of George Melton and his Heirs; " and then they found, that George and Evan Melton, and John Colt, made a " Lease for 21 Years unto one Speed, which Lease came unto Wingfield the " Defendant, and then George Melton died. And then Susan Andrews entred " upon Wingfield, and made the Lease unto the Plaintiff, Francis Duncombe, " upon whom Wingfield re-enters. And whether the Re-entry of Wingfield " be good or no, is the Question, scil. the utrum, &c.

I divide the Case into 4 Points.

Co. L. 354. a. 4 Le. 206.

1. Whether the Wife be remitted upon the second Fine to her first Entail or not: And I think she is, and her Husband too, as at the Common Law, upon the taking the second Estate in Tail, as the Case is found joined to this, as a Part of the same. First Point, whether that Remitter extends to

to Suſan Andrews, and the other old Rem. and I think it did as long as the Remitter ſtood.

2. Whether the Remitter failed, and when, and I think it failed, and vaniſhed ſo ſoon as the Wife died, and then the old Remainders were turned into Rights. 2.

3. That though the Remitter ceaſed upon the Death of the Wife, yet after the Death of Melton the Husband, Suſan Andrews had lawful Entry by the Stat. 32 H. 8. and by her Entry did both regain her own Eſtate and the Remainders, and ſo ſhe had Power to make the Leaſe to the Plaintiff. 3.

4. That there is no Recovery at all found in the Caſe, in reſpect of the Repugnancy of the Verdict. 4.

And ſo the firſt Point, I make it no Queſtion but that the Husband and Wife being Tenants in ſpecial Tail, with Rem. over, the Husband diſcontinues by Fine or Feoffment, and then takes an Eſtate back again to himſelf and his Wife in ſpecial Tail. That by this (as it was at the Common Law) the Wife was ipſo facto remitted, and by neceſſary Conſequence the Husband alſo, though it were true, that the Husband was ſo far bound by his own Act, that he could not in his own Perſon claim it ſo; wherein Littleton being plain, and the Law clear, I ſo leave it without regard of the Book 21 E. 3. that makes Difference where the Wife or Husband ſurvives, for that Remitter is executed at the firſt. And the Caſe is the ſtronger; yet in Conſideration of the Remitter, according to the Judgment of John Saye's Caſe, 41 E. 3. 17. where a Feoffment was made to a Husband and Wife in ſpecial Tail, the Rem. to A. then the Husband made a Feoffment, and took an Eſtate to him and his Wife, in ſpecial Tail too, 41 Aſſ. 1. the Rem. to B. the Husband died, the Wife agreed to the ſecond Eſtate (as in reſpect of her ſelf ſhe might) both being made during Coverture; yet it was judged, that for the Benefit of A. in the Rem. ſhe could not, much more here the beſt Eſtate ſhall be judged in the Wife, even for her ſelf, ſince ſhe lived not to croſs the Judgment of Law by her own Act. And likewiſe for the Benefit of the Rem. as I alſo held in the Caſe of Sir John Sherely, but Hawtrie's Caſe, M. 2 & 3 Eliz. Dyer, 192. and 18 Eliz. Dyer, Husband and Wife ſeiſed in Tail, Remainder in Fee to the Husband, he made a Feoffment to the Uſe of himſelf and his Wife for Life, the Rem. to her younger Son, and died; the Wife might chooſe the Latter (though he did chooſe the Firſt) for then the Rem. could not be remitted.

First Point. Co. L. 354. a. Ant. 204.

Co. L. 353. b.

Plo. 114. b.

Ant. 71. Accord.

Syd. 63. Dy. 351. b. 333.

But now it is objected, that the Caſe differs from that it was at the Common Law, for two ſpecial Reaſons.

The firſt, that the ſecond Eſtate to the Wife in this Caſe in Queſtion grew by a Uſe declared to the Husband and Wife in Tail, upon a Fine by the Husband only; which Eſtate coming in Place of the Uſe, muſt by Force of the Statute of Uſes, be ſuch in Quantity and Quality, as the Uſe was which was out of a new Eſtate and not of the Old, whereunto the Remitter ſhould be.

The ſecond Objection is, that the firſt Eſtate being to the Husband and Wife in ſpecial Tail, ſo that Iſſues inheritable muſt claim as Heirs to the Husband as well as the Wife, his Fine hath utterly barred thoſe Iſſues and himſelf, and hath extinct the Intail, and ſo Conſequently that Eſtate cannot be remitted.

Dy. 351. b.

As to the firſt Objection, I confeſs it is clear, that if an Infant or a Woman, having Right of Lands diſcontinued, wherein Entry was not lawful, if the ſame Infant, or Woman Covert come to that Land by way of an Uſe raiſed out of that Eſtate, the firſt Taker of ſuch Eſtate ſhall not be remitted, for the Violence of the Letter of the Stat. 27 H. 8. And the firſt Taker in this Caſe, is to be underſtood of the firſt Taker of every ſeveral Eſtate, as well in Remainder as in Poſſeſſion. Dy. 77. b.

Co. L. 348. b. Poſt. 298.

And therefore, 34 H. 8. Dyer 54. Amy Townſend's Caſe, Tenant in Tail, made a Feoffment in Fee to the Uſe of his Wife for Life, the Remainder to next Heir of that Intail, he ſhall not be remitted, no not if he had the Uſe by Deſcent, as Simon's Caſe, and Marmaduke's Caſe, 6 E. 6. if he were the firſt to whom the Poſſeſſion was firſt transferred by the Statute, for then ſtill he falls within the Letter of the Law, that he muſt be in of the Eſtate, as he was of the Uſe, and yet he hath both the Free-hold and the Right, and that

Co. L. 348. b. Dy. 23. b. Plo. 114. a. b. Dy. 54. b. Plo. 207. a. Dy. 77, 106, 126. 1 Co. 102. b.

that without his fault, and can have no Action, which are Littleton's Grounds and Reasons of Remitters.

Parliament, Br. 42. Co. L. 95. b. 6 Co. 12, 27. Plo. 59. a. Pal. 541.

Note, an Act of Parliament hath every Man's Consent as well to come, as present, and so he is here an Author of his own Hurt, and also he must hold it as the Act gives it, having Power to bind every Man's Right; either finally or sub modo, as here it is for the first Taker. And therefore are Savings or Strangers Rights in Acts of Parliament.

Co. L. 341.

See M. 15 & 16 Eliz. Dyer, 329. & 351. Dyer, which is a stranger Case, Custuy que use in Tail; Remainder to a Stranger in Tail, Remainder to himself in Fee made a Feoffment before the Statute of 27 H. 8. to the Use of himself for Life, the Remainder to his eldest Son, Heir of his first Entail, and his Wife for Life, and died: Now the Son was in by the Statute of the new Estate. Resolved by four Judges in the Chancery, that the old Feoffees could not enter to revive to the Son of the first use of Entail; whereof one Reason was given, that the Son could not enter against his own Act, and against the Statute, have any other Estate; no not though it were by the Act of another, scil. the Feoffees, and after the Statute had had his Working, yet the next Heir of the Entail should be remitted.

But the first Taker of a Remainder may be remedied by Accident, that is, if a Remitter happen to another before the Land come to him. As if A. be Tenant in Tail, the Remainder to B. in Tail, and A. make a Feoffment to the Use of himself in Tail, the Remainder to B. in Tail again. And then the Statute executes the Uses. Now both A. and B. have their Estates de Novo. But if A. die, now his Issue shall be remitted, and so by Consequence shall B. in Remainder be remitted though he were a first Taker.

Plo. 114.

Note, that in Amy Townsend's Case it was objected, that there was a Saving of Rights in the Statute of Uses, and by Consequence of Remitters whereunto in the Argument there was no Answer made by the adverse Counsel. But Plowden the Reporter notes, that the Saving is only of former Rights: But that Answer satisfies not, for it saves Right after the Statute, but the Saving indeed preserves Rights, but to be recovered and remitted, as may stand with the Stat. not against it. But I answer to this, that the Stat. of 32 H. 8. hath changed the Reason of this Case, and hath given the Wife Entry against her Husband's Fine; so that now by the Use raised unto her out of such Estate, she is not in of an Estate discontinued, but of an Estate whereupon after the Death of her Husband she might have re-entred.

Cap. 28.

Co. L. 236. a. Mo. 63.

Now as upon Re-entry in such Case where the Entry is lawful she is remitted, so where an Estate is conveyed unto her, and is in her, though by the Statute, her Entry being lawful, she shall be judged in of her best Estate, her Remitter being intratio legitima, though not actualis, and so is Dyer, 192.

But then it is again re-objected, that yet at least 'till there be an actual Entry, the Estate shall be judged in her as the Use was, which was out of the new Estate, according to the Opinion of the Counsel that argued against the Remitter in Amy Townsend's Case of a Feoffment made by a Disseisor to the Use of the Disseisee, that the Disseisee should not be remitted 'till an actual Entry.

Plo. 114. a.

3 Cr. 20. Co. L. 361. Lit. Sect. 693, 695. Co. L. 363. b.

To this I answer, that I hold the Law not to be so. To which Purpose, see Littl. 157. If a Man have Right of Entry, and take Estate being of full Age, &c. he is presently without Entry remitted, though he took the Estate by contrary Conveyance; but he says, that if he take but a Lease for Years, that doth not remit him but upon his actual Entry.

And yet I answer further as clear, that the Jury find first this second Fine to the Issue of the Husband and the Wife in special Tail. And that by Force whereof and of the Stat. of Uses, they were seised accordingly. But then they proceeded further, and say, that they were both in actual Possession of the Land. Now the actual Possession, which imports Entry of the Husband, must be according to the Estate, which is intire and indivisible with his Wife, which is the Reason also of the entire Remitter to the Husband

So then it appears plainly by the Verdict that there was actual Entry by, and for the Wife, which makes an End of that Objection.

As to the second Objection it is also true, that by the Fine of the Husband alone, the Entail to the Issues is finally and totally barred: And so are the Cases 18 Eliz. Dyer 351 & 269. and Beaum. Case. And so also and upon the same Reason is 16 Eliz. Dyer 332. Attainder of Treason of the Father forfeits the Lands against the Issues, which are grounded upon the Force of the Letter and Meaning of the Stat 4 H. 7. & 32 H. 8. and the Stat. of Treasons, 26 H. 8. 13. 6 Co. 139. a. Mo. 28. 8 Co. 72 a. 9 Co. 140. a.

But yet I answer; That the Entail, which is barred to the Issues, yet remains, notwithstanding this Fine to the Wife in Right, as to her self, and to all Estates and Remainders depending upon it, and to all the Consequences of Benefit to her self, and to others by her as long as she lives, as amply and beneficially, as if the Fine had not been levied.

And therefore first take Beaumond's Case, Co. l. 9. 140. which was, that John Beaumond and his Wife being seised in special Tail, Remainder to John Beaumond in Fee, he alone levied a Fine to E. 6. in Fee, which Estate came to the Earl of Huntington in Fee. Beaumond having Issue, died, his Wife entred; the Earl of Huntington confirmed the Estate in the Wife, habendum to her and the Heirs of the Body of her and her Husband: And it was ruled that the Confirmation wrought nothing, because she had as great an Estate before. And also the Issues could not be made inheritable, which were before barred by their Father's Fine, and the Estate Tail as against them lawfully given to another. And it was further resolved by way of Admittance, that if the Remainder in Fee had not been to Beaumond himself, but to a Stranger, the Entry of the Wife had restored that Remainder to the Stranger, and had left nothing in the Cognisee, but a meer possibility, so the hath the Tail, not only for her self, but to the Benefit and beneficial to other Estates growing out of one Root with his. And yet during the Life of Beaumond, the Entail had been barred, and all had been in the Cognisee, and the Wife had had nothing but a possibility via versa. Cr. Car. 476, 9 Co. 140. a. b. 9 Co. 141. a.

Now it is plain and must be confessed, that the Remitter in this Case is to all Purposes as effectual, not only to the Wife, but to the Rem. and Estates depending, as was the Entry in Beaumond's Case. For Remitter is as an Entry in Law, the Law changing the Estate as an Entry, if it could be had, should.

Now because the Statute of H. 7. and especially 32 H. 8. hath made a more absolute Subjection of Entails to Fines with Proclamations than the Common Law did since the Statute of Donis conditionalibus, and that the Stat. and the Exposit. upon them, together with the other Stat. of 11 H. 7. of Discontinuance of Jointures in Tail, have induced many Intricacies, Perplexities, and appearing Contrarieties, let us in some Measure clear that Learning, that we may see a Way through it upon all Occasions. Stat. 4 H. 7. & 32 H. 8. What Confession they have made upon Entails. Post. 332. 8 Co. 78. a.

It hath been a Rule that hath destroyed Perpetuities, that an Estate cannot be made to cease for a Time, and then to rise again or to cease, as to one Person, and have Being to another, or to deprive a Tenant in Tail by Condition or Limitation of Power of Alienation, by Fine or Common Recovery: Yet in these Points these Stat. have induced all these Singularities into Entails. And therefore at this Day,

1. First, An Estate Tail may cease for a Time, and yet rise again, and may cease to one Person, and be in Force & esse to another.

2. Secondly. An Estate in Tail may be in it self perfect, and may be alienedd, and yet cannot descend, though there be Issues of the Entail.

3. Thirdly, An Entail may descend and cannot be alienedd.

4. Lastly, An Entail may be full, and yet can neither descend, nor be alienedd.

Also as to the first, Beaumond's Case is so, that the Husband's Fine alone binds the Entail, so as during his Life all is given away, and there is nothing left but a meer Possibility. That if the Wife survive, she shall be again upon her Re-entry Tenant in Tail in State as before; so it is ceased for that Time, and the Issue barred; but as to the Wife, if she survive, the whole Tail revives and is restored to her. To the first. Dy. 122. b.

To the Second.

3 Co. 90. a. 1 Cr 435. Poſt. 333. Mo. 147, 252. Jones 33.

For the 2. ſee Archer's Caſe judged 20 Eliz. in the Common Pleas, that if the Grandfather by Tenant in Tail, and the Father diſſeiſe him, and levy a Fine, and then the Grandfather die, and alſo the Father, that the Son Iſſue in Tail ſhall be barred. And the ſame I hold, if the Father had levied this Fine without diſſeiſing his Grandfather, or if he had died before the Grandfather; for though the Son ſhould claim as Heir in Tail to the Grandfather as laſt ſeiſed by the Entail, yet he muſt claim as Heir in Blood by the Father, and ſo falls plainly within the Words as Heir of the Perſon that levied the Fine, and claiming only by an Entail made to the Anceſtor of him that levied the Fine.

1 Cr. 524, 543, Mo. 252. Jones 34. 1 Cr. 435. Po. 332, 333, 334.

And I hold, that if Tenant in Tail have Iſſue three Sons, and the ſecond Son levy a Fine with Proclamations in the Life of his Father who dies, this ſhall not bar the elder Brother: But if the elder die without Iſſue in the Life of the Father, the Second ſhall be barred: And if the Elder without Iſſue after the Death of the Father, ſo as the Elder had the whole Tail, yet if the ſecond or his Iſſue ſurvive and then die, it ſhall bar the younger (for he is plainly within the Words) as well as the ſecond that levied the Fine. The Words of the Stat. of 32 H. 8. are, That a Fine levied of Lands in any wiſe entailed to the Conuſor, or any of his Anceſtors, ſhall be a bar againſt the Perſon and his Heirs, claiming only by force of ſuch Entail any Doubt, &c. So the Fine doth bar Heirs of the Entail in many Caſes, where the Conuſor cannot give the Land becauſe he hath it not.

Litt. Sect. 708.

And therefore I match it with the Caſe upon Weſtm. 2. de Donis. They to whom the Land was given ſhall have no Power to alien, but that it ſhall remain to the Iſſue. Now ſee Littl. Caſe, fo. 160. 38 E. 3. 2. 9 E. 3. 16, &c. That if Tenant in Tail have Iſſue three Sons and Diſcontinue, and the middle Son releaſe and bind him and his Heirs to Warranty, and the middle Son dies, and then the Father dies; This Warranty is collateral to the elder, and lineal to the younger, becauſe by Poſſibility he might have claimed from him of that Entail, and ſo within the Intent, not the Letter of the Law, as here it is.

So this Land now cannot deſcend unto the Heirs in Archer's Caſe, (to return to that Caſe) becauſe the Deſcent is ſtopt and ſtrangled: Yet I hold it clear, that the Grandfather after the Fine levied may himſelf alien: For, as it were againſt Reaſon; ſo the Statute hath no Letter to bar his Anceſtors, but his Heirs only that levied the Fine, ſo no Saving is needful.

1 Cr. 435. 2 Gro. 608 Jones 61. 3 Co. 91. a. 90. a. Yel. 101. 9 Co. 141. Saund. 261. Hutt. 84. 1 Cr. 435.

And therefore in Archer's Caſe, if after the Fine levied by the Father, the Grandfather had made a Feoffment to a Stranger, yea, or but a Bargain and Sale in Fee, and had died, this Bargainee ſhould have both holden the Land againſt the Iſſue in Tail: (For they are barred, and their Right extinct by the Fine; and ſo the Stat. of Weſt. 2. ſet looſe not to the Reverſion) and againſt the Father's Conuſee, for the Fine in this Caſe doth but extinguiſh the Tail, but cannot give it by his Conveyance that had not ſo much as Right or a Poſſibility, though there were a Poſſibility. So the Stat. leaves the Form and Effect of the Fine (as to all Purpoſes and Perſons, but the Iſſues in Tail) to the ordinary Rules of Law, whereof one is, That a Conveyance to one by him, that hath but a naked Right or Poſſibility, works by the extinguiſhing of it in the Poſſeſſion, S. Moyle Finche's Caſe, Co. lib. 6. 70. a.

Co. L. 277. a. 266. a.

3 Co. 88. a.

So if the Father's Conuſee will claim, the other ſhall ſay, Partes finis nihil, &c. If the Iſſue in Tail will claim, he ſhall Plea the Fine with a Que eſtat. though it be falſe which the other ſhall not deny, but muſt anſwer the Fine, and partes finis nihil, &c. is no Plea for an Iſſue in Tail, for he is a Privy.

To the Third.

As to the third Caſe, the Stat. of 11 H. 7. makes it as is Sir George Brown's Caſe, Co lib. 3. fo. 50. b. Bridges and his Wife Tenants in ſpec. Tail of the Proviſion of the Husband within the Statute of 11 H. 7. rem. to Bridges in Fee, had Iſſue Anthony Bridges, and died; Anthony levies a Fine to Brown, and then the Mother made a Diſcontinuance, Brown may enter, not by the Poſſibility of his Eſtate ariſing out of the Entail, (for he could not have an Intereſt in that, becauſe the whole Entail was actually without Change in the Mother) but by the Fee-ſimple. And ſo alſo is Wimbiſh and Talboy's Caſe; ſo then the Tail cannot be alienated by the Mothers, by Reaſon of the Reſtraint of 11 H. 7. Neither can deſcend by Reaſon of the Fine by the Iſſue in Tail in her Life.

9 Co. 140. a.

Yel. 101. Cr. Jac. 173.

As to the four and laſt, one may be ſeiſed of a perfect Eſtate in Tail, and yet the ſame can neither be alienèd nor deſcend, as in the Caſe at Bar, and in Beaumond's

It cannot deſcend to the Iſſues from the Mother, though the whole Eſtate Tail be in her, becauſe they were barred by the Father's Fine before; It cannot be alienèd by the Wife, becauſe alſo it was alienèd before by the Husband in a Sort obliquely. 9 Co. 142. b.

For though it be true, that when the Husband hath levied a Fine, and die, and his Wife enter, the Eſtate is wholly in her, ſo the the Alienee hath no Part of the Eſtate-Tail in him, nor any Eſtate derived out of it, but it is wholly evicted. So that if there be no Iſſue of the Entail, the Husband's Conuſee hath loſt the Eſtate for ever; (yet if there be Iſſue in Tail at the Death of the Wife, the Eſtate of the Conuſee ſhall riſe again ſo ſoon as ſhe dies, by Force of the Husband's Fine, and that ipſo facto without Entry, as upon a Ceſſer of the Wife's Eſtate, like unto Chudleigh's Caſe, of contingent Uſes ariſing and falling, where there is no Diſturbance to the Poſſeſſion. Jones 401. 2 Ro.Rep. 490. 4 Le. 57. 144.

So when the Wife enters upon the Conuſee, that which was in him as a baſe Fee-ſimple, ſo long as the Entail laſted, is now in the Wife a perfect Entail again, but to endure only during the Life of the Wife, and then to return again to the Conuſee, ſo long as there ſhall be Iſſues. So then the Caſe is, that the Intail remains in the Wife remitted, but neither to be alienèd nor deſcend, which are Incidents inſeparable, but by Act of Parliament: So Dean and Chapters have a Fee-ſimple to retain and go in Succeſſion, but not to alien. But now to all other Purpoſes the Entail abides, and is in the Wife in the ſame Eſtate as it was before.

For firſt, Though the Iſſue be diſinherited, ſo as it is all one to the Tail as if there were no Iſſue, yet ſhe is no Tenant puis poſſibility, or in that Degree, as it is reſolved in Beaumond's Caſe.

Alſo ſhe may make Leaſes for three Lives, under the old Rent, &c. according to the Statute, and it ſhall neither be Forfeiture nor Diſcontinuance, as it is alſo obſerved there. 2 Cr. 688.

I hold it alſo clear, that in this Caſe of Remitter, and in the Caſe of Entry of the Wife, as in Beaumond's Caſe, ſhe ſhall not only become Tenant in Tail (as I have ſaid) but her Entry and Remitter ſhall alſo remit all Remainders and Reverſions that were depending upon her Eſtate, that are otherwiſe bound, which is alſo reſolved in the Argument of Beaum. Caſe.

Therefore put the Caſe, that Land be ſpecially entailed to A. and his Wife, the Remainder to B. in Tail, the Remainder to C. in Fee, and A. the Husband levies a Fine alone to D. in Fee, and dies, leaving Iſſue; the Wife enters, ſhe is in of her Eſtate in Tail, and her Entry alſo remits B. and C. to their ſeveral Remainders, and hath put D. out of his whole Eſtate. And therefore I am clear of Opinion, that the Wife in that Caſe may ſuffer a common Recovery againſt her ſelf as Tenant in Tail, and vouch the common Vouchee, and that ſhall bar the old Remainders of B. and C. for ſhe cannot be ſaid to be eins d'autre eſtate at all, much leſs to them. 1 Le. 157. 221. 2 Ro. R. 424. 228. 1 Co. 139. a.

And yet it is a rare Caſe, that a common Recovery againſt the Tenant in Tail ſhall bar the Remainder, and not bar the Entail: For here the Entail (that is, the Iſſues of the Entail) were barred before by the Fine; but yet it may be truly ſaid, that the Entail is barred by the Recovery, becauſe the Wife was ſeiſed of the whole Entail, which was ſo barred, and the Remainders are then depending immediately upon it. 1 Le. 157. 221.

But what ſhall be the Effect of that Recovery after the Death of the Wife againſt D. to whom the Husband alone levied the Fine, I will ſpeak hereafter.

If the Wife, after ſuch common Recovery paſſed againſt her, die, leaving Iſſue by her Husband, now D. is to have the Land (as hath been ſaid) neither can the Recovery had againſt her hurt him; for as to him ſhe was eins de autre eſtate, and therefore the Value cannot come to him. And if ſhe had come in as a Vouchee, yet it could not have hurt D. for his Eſtate and hers never ſtood together, nor had Dependance the one upon the other. And he had his Eſtate divided from hers, and by contrary Means, though both out of the Root of the Entail.

2. Great Point.

The next Question is, taking the Case that the Husband and Wife were remitted to the first Estate in Tail, and that by Consequence Susan Andrews and the rest in Remainders were also remitted (as I have holden) when the Wife dies leaving her Husband that was bound by his own Fine, what now is become of those Remainders?

And upon that I am of clear Opinion, that now these Remainders to Susan Andrews and Duncombe, that were by the Remitter of the Wife made actual Remainders, are by her Death dislodged and turned into Rights, as they were by the Fine, and should still have been, if the Wife had not been remitted or re-entred in the like Case, whereof the Reason is plain.

For the Husband by his Fine gave and had Power to give the whole Estate in Tail, as to himself and the Issues in Tail; but he had no Power to prejudice the Wife, so she is only saved and the Estate for her sake; and so much as concerns her and others, that should not claim under the Husband or the Issues (if the Land had come to them) of which Sort these Remainders are; so that now she is removed by Death or otherwise, that Estate that was preserved for her only ceaseth, and the Land returns to the former Current and State that was raised by the Fine to the Alienee, and so by Consequence the Remainders which were remitted only out of Necessity, because their Fundamental Estate was remitted, must fail together with it, for the old Remainder cannot depend and be joined to the new Estate, which was and is a Fee-simple. A Remitter cannot be but when the Freehold in Possession and the Right meet; and therefore Litt. fol. 153. puts it, that if the Husband discontinue the Wife's Land, and take an Estate to himself for Life, the Remainder to his Wife, she is not remitted till the Remainder fall. By the same Reason in this Case, the Remitter holds no longer, when the Possession and Right part.

Plo. 114. b.

And now I say (the Husband surviving the Wife) the Estate is ipso facto adjudged in him according to the Estate of the new Fine, and not according to the former Entail, which he had given away and barred by his Fine: And now it is all one, as if the Wife in this Case had never been remitted, or had never entred after the Husband's Fine, in which Case the Remainders could never have been remitted, or as if the Land had been given with like Remainders to the Husband alone in special Tail; and so the Remainders that were before during the Remitter in esse are now turned into Rights of Remainders only. But if on the other Side the Husband in this Case had died first, and without Issue, then had the Remainders continued remitted, because there should have been no Interposition of the new Estate between the Wife and the Rem. as in the Case in Question there is.

Out of this Discourse appears the Difference between the Case since the Statute, and Littleton's Case, which is the like, before the Stat. Litt. fol. 151. saith, That if Land be given to the Husband and Wife in special Tail, and the Husband alien it by Fine, and take an Estate again to him and his Wife, that this is a Remitter to them both, because they are one Person, and the Estate is indivisible. Now to see how far this very Case is the same in Law since the Stat. (as before) and where it differs, and upon what Reason.

I agree, that in the Case in Question, the Estate resumed to the Husband and Wife, did remit them both as at the Common Law; for the Wife and her Estate (as to her) is the same that was at the Common Law, no Way further prejudiced by her Husband's Fine; and therefore since she is remitted, her Husband must also be remitted with her and for her, upon Litt. Reason.

But whereas in Littleton's Case the Remitter was total to the whole Entail, as well for the Issues as for the Parties themselves, and so did wholly abolish the whole new Estate, as tortious and wrongful: Now the Husband's Fine and new Estate upon it was not utterly abolished, but interrupted only by the Wife and for her, and is rightful and noe tortious against himself, and his Issues, as being warranted by a Statute Law.

Note, That the Husband's Fine at the Common Law did bind himself as strongly during his own Life as his Fine, with Proclamations now, and

yet he was remitted againſt it, by Reaſon of his Wife's Remitter, which was to the whole Eſtate in Tail to all Purpoſes, and ſo he is now remittable for his Wife, and with her againſt his Fine, with Proclamations, ſo far as her Remitter extends ſince the Stat. and no further.

And therefore I am of Opinion, that if upon ſuch a Gift, a Condition were annexed, that the Husband ſhould not levy a Fine with Proclamations to bar his Iſſues that this Condition were void, and yet the like Condition had been good at the Common Law. 10 Co. 29. a. Mo. 212. Co. L. 223.

The next Point is, ſince the Remitter ceaſeth by the Death of the Wife, and that the Remainders to Suſan Andrews and the reſt are turned into Rights, how now they may relieve themſelves after the Death of Melton the Huſband without Iſſue, as it falls out in the Caſe. 3. Great Point.

As to this Point I have declared my Opinion before, that after the Death of the Wife, the Remitter ceaſed, and the Land returned again into the Eſtate paſſed by the ſecond Fine, which continued during the Life of the Husband, and was to continue as long as there was Iſſue, if there had been any; for till then, they in the Remainder had no Title to demand the Land; but now when Melton the Husband died without Iſſue, then came the Remainder to be demandable, and then Suſan Andrews did enter upon Wingfield the Defendant, claiming under the Husband, and made the Leaſe to Duncombe the Plaintiff, which I hold to be lawful. And I hold this Entry of Suſan Andrews to be lawful, and that without Queſtion; for the Words of the Law of 32 H. 8. are clear and certain that no Fine by the Husband only of any Land, being the Inheritance for Freehold of the Wife, ſhall in any wiſe make any Diſcontinuance, or be prejudicial to the Wife or her Heirs, or to ſuch as ſhall have Right, by the Death of ſuch Wife or Wives, but that the ſame Wife and her Heirs, and ſuch other to whom ſuch Right ſhall appertain after her Deceaſe, ſhall and may lawfully enter into the ſame; So the Words are clear, not only to relieve the Wife and her Heirs, but alſo other Strangers that have Right to the Land by or after her Death. And for that Purpoſe the Stat. puts two Caſes; one, where the Wife hath an Eſtate of Inheritance either Fee-ſimple or Fee-tail; the other, where ſhe hath but a Freehold, meaning an Eſtate for Life in the Land aliened. 1 Cr. 321.

Now in both Caſes it gives Relief by Entry to the Heirs of the Wife, which can be but in Caſe of Inheritance. And therefore in the Caſe of Freehold Strangers in Remainder or Reverſion muſt needs be relieved under the other Words, and by the ſame Reaſon upon Eſtates in Tail.

And as no Man will doubt, but that if the Wife enter firſt, it ſhall Benefit thoſe in Remainders alſo, though the Statute ſhould be thought to be made only for the good of the Wives direcly; ſo clearly here the Words give Entry, that is the firſt Entry as well to others as to the Wives and their Heirs: Yet I am of Opinion, that if Wife being ſeiſed in Fee after ſuch Alienation of the Husband, ſhould die without Heir, that the Lord by Eſcheat ſhould not be within the Remedy of this Statute, as I held lately in the Caſe of the Lord Stanhop's, Quare Imped.

Now laſtly, touching the Common Recovery mentioned in this Verdict, I hold it to be inſufficiently found, as there is no Recovery at all. And therefore obſerve, that after the ſecond Fine by Melton the Husband alone, Menſe Mich 44 E. it is found, that he and his Wife were ſeiſed in ſpecial Tail with the new Remainders over and in actual Poſſeſſion; and that 14 Novem. 44 Eliz. the Wife died, and that Melton the Husband continued his Poſſeſſion, and was ſeiſed prout, &c. And being ſo ſeiſed, 1 Feb. 45 Eliz. by Indenture for Money, did bargain and ſell the Land unto Curtis and Stephenſon, and their Heirs, and there ſet down the Indenture in hæc verba: To have and to hold to them and their Heirs, with a Covenant in the Deed, that a Recovery ſhould be had againſt them to the Uſe of George Melton and his Heirs, but make no Concluſion, That Curtis and Stephenſon were ſeiſed by Force of that, not ſo much as prout Lex. But then they find that one Colt and Holland, 23 Jan. 45 Eliz. did ſue a Writ of Entry, &c. againſt Curtis and Stephenſon 4. Great Point.

Stephenſon, then Tenants of the Freehold of the Premiſes ret. oct. pur. and thereupon a Recovery paſt with the Voucher of George Melton, and that the Sheriff returned Execution, and that by Force thereof, Colt and Holland were ſeiſed prout lex poſtulat. So that firſt it was found that Melton was ſeiſed in Poſſeſſion in Tail general, and ſo continued till 1 Feb. 45 Eliz. and then granted, bargain'd and ſold the Land, which by the Word of Grant will not paſs without Livery, neither doth it imply Livery as the Word Feoffment would, and of the Bargain and Sale there is no Inrollment found, neither doth the Jury find that they were ſeiſed by Force of this Conveyance.

Curtis cannot be taken to be Tenant to the Recovery, for either it muſt be by the ſpecial Conveyance mentioned, or by the Implication tunc tenentem. By the ſpecial Conveyance it cannot be, becauſe the Inrollment is not found; like unto Sir George Brown's Caſe, where it was found that Anthony Bridges levied a Fine where it was taken to be without Proclamations, though it were otherwiſe in commmon Intent and Practiſe; for otherwiſe the Jury muſt find in this Caſe, that Melton did bargain and ſell, but that the Deed was not inrolled; and ſo in the other Caſe that the Fine was without Proclamations, which were againſt Senſe, to enforce a Jury to find a Negative of that that is not preſumed except it be found.

3 Co. 86. b.

Alſo Note, no Touch in the Verdict that Curtis was ſeiſed by Force of the Bargain and Sale, no not ſo much as prout Lex, &c.

Now for the tunc tenentem (beſides that the Court ſhall not intend when they found a ſpecial Means of Tenancy, that he was Tenant by another Mean, eſpecially by a Diſſeiſin) as this Verdict is found it cannot be, or at leaſt it cannot be effectual.

The Writ of Entry was brought 23 Jan, 47 Eliz. againſt Curtis, tunc tenent. Ret. cra. pur. which was 3 Feb.

Now it is true, that if he were Tenant either at the Time of the Writ purchaſed, or at the Return when the Recovery paſſed, it had been ſufficient; but by the Verdict it is plain, that he could not be Tenant at the Day of the Writ purchaſed, for Melton continued his Poſſeſſion till 1 Feb. and if Curtis ſhould be taken to have diſſeiſed Melton, yet ſince Melton is found ſeiſed 1 Febr. there muſt be a Re-entry, and ſo the Tenancy lawfully diſſolved before the Recovery paſſed.

Now where it is found that Curtis and Stephenſon were Tenants of the Freehold, at the Time of the Writ of Entry purchaſed, that appears to the Court falſe, for that was before the Bargain and Sale, till which Time Melton is found to be ſeiſed, and no other Conveyance found unto them, but by the Bargain and Sale.

I grant that a Verdict may be taken by a reaſonable Intendent, as in Fulwood's Caſe, though the Words be imperfect. But that muſt be where that Intendment ſtands upright, and nothing in the Verdict to impugn it, as there is in this Caſe expreſly: For there is plain Falſity and Repugnancy in this Verdict, one Part ſaying that Melton continued Tenant till 1 Feb. the other Part ſaying that Curtis was Tenant 23 Jan. or elſe by confeſſing and avoiding that he was Tenant 23 Jan. by Diſſeiſin, and that Melton re-entred and was ſeiſed 1 Feb. For the Recovery was not finiſhed till Cra. pur. which is 3 Feb.

Ant. 54. 55.

Alſo I agree that where a ſpecial Verdict concludes their Doubt upon ſome ſpecial Point, that the Court ſhall doubt of no more, but allow all other Points, though there be ſome Defect, as in Goodale's Caſe, Co. lib. 5. fol. 96. where the Jury made this Doubt, Whether the Payment of one hundred Pounds, with Agreement to have ſome Part of it again, were ſufficient upon a Condition to defeat the Eſtate of a Stranger. The Court regarded not that there was no Title found for the Party that made the Entry, whereupon the Action was brought.

Cr. Car. 22.

But here the Jury doth conclude upon the general, Whether the Defendants Entry were lawful or no, which is all one as if they had referred to the Court their utrum, whether the Defendant were guilty or not, which depends upon all Parts of the Verdict indifferently, that may prove him Guilty or not Guilty.

And it is a dangerous Thing to conſtrue a Verdict larger, or otherwiſe than upon a ſure Ground, for it ſubjects them to an Attaint, as in this Caſe, to make them to find as it were a perfect Recovery and perfect Tenant, which without Queſtion they meant not generally and at large, but only by this Bargain and Sale, and by no other Means.

So upon the whole Matter, I was of Opinion, That Judgment was to be given for the Plaintiff, and ſo were the reſt of the Judges that had ſpoken before me: And ſo Judgment was given.

But they having argued before me, did take the Recovery to be well enough found upon the Word Tunc Tenens, not obſerving all the Parts, as I noted before. 2 Cro. 622.

And they held that yet the Recovery was void, becauſe Melton was by the Remitter (after the Death of the Wife without Iſſue) but Tenant in Tail puens poſſibility, and ſo within the Statute of 14 Eliz. of feigned Recoveries againſt Tenants for Life Vouchers.

But taking the Caſe as I have argued it, and as I hold the Law clear, Melton was never leſs than Tenant in Tail: Firſt, by the Fine of his Wife and himſelf, and then by his own Fine to the Uſe of himſelf and his Wife again in the ſpecial Tail, the Remainder to himſelf in general Tail, which remitted him and his Wife to the old Tail ſpecial; with the old Remainders depending upon it as long as the Wife lived: But when the Wife died, then the old Tail and the Remainders vaniſhed, and the Husband Melton became Tenant in Tail general by his latter Remainder raiſed by his own Fine, and ſo being ever Tenant in Tail, can by no Means be drawn within the Statute of 32 H 8. & 14 Eliz. and then if the Recovery were good, he comes in a Voucher of all his Titles in Tail, and binds all Remainders upon any of the Eſtates, which he had at any Time.

But of this Point I ſpake not publickly, becauſe I held it no Recovery as it was found: But Juſtice Hutton obſerving my Courſe, did ask me in private what I thought of the Caſe, admitting the Recovery to be good. To whom I ſaid as before, that then I held againſt the Plaintiff.

(341) Waterhouſe & Uxor *verſus* Saltmarſh.

Paſch. 17 Jac.

" SIR Edward Waterhouſe and his Wife were Plaintiffs in the Star-Cham- " ber againſt Saltmarſh, Under-Sheriff of Yorkſhire, and divers his Bai- " liffs, and againſt J. Keeling. The Caſe, and thus, The Plaintiff and " Keeling were bound with David Waterhouſe as his Sureties, to one Coale in " 400 l. for the Payment of 200 l. whereupon Judgment was given againſt " Keeling; but at the Suit of Keeling, Execution was forborn by Coale, to " ſee if any Contribution could be gotten of the Plaintiff, for David Water- " houſe was Bankrupt; but at laſt nothing coming, Coale took of Keelyng " 270 l. in Satisfaction of his Debt, yet delivered his Bond into the Hand " of Keeling, allowing him to ſue it againſt the Plaintiff. Againſt whom " Keeling ſent to Saltmarſh a Latitat, and withal a Cap' Utlegat' before Judg- " ment at the Suit of one Baſil a Stranger, without his Privity or the Al- " lowance of the Court, or the King's Attorney, to the End, that if the " Plaintiff kept his Houſe, they might break the Houſe, and ſo ſerve both it " and the Latitat. The Sheriff thereupon entred the Houſe in the Morning, the " outer Door being open; but being within the Houſe with ſix Bailiffs, ſome " of them being Gaol-birds, ſhut the Doors and drew their Swords, and pre- " ſently he, with two of them with their Swords drawn ran up to the Cham- " ber, where the Plaintiff and his Wife were in Bed and the Doors lockt, and " knocking a little, without telling what they were, or wherefore they came " brake open the Door and took him, and took Bond for his Appearance upon the " Latitat and 40 s. for ſuing out a Superſed' upon the Outlawry, and ſo diſcharged " him

Riot for breaking an Houſe upon private Proceſs. Po. 269. Ant. 62. 4 Leo. 41. 2 Cro. 556.

5 Co. 93. a.

" him, and afterwards the Plaintiff paid or gave Aſſurance to Keeling for
" 90 l. and had his Bonds both to Coale and the Sheriff delivered up unto
5 Co. 91. b. " him. Upon all this the Sheriff was fined 200 l. for the unneceſſary Out-
Poſt. 269. rage and Terror of this Arreſt, and for not ſignifying that he was Sheriff, that the Door might have been opened without Violence, but eſpecially for diſcharging the Plaintiff upon the Capias Utlegat'; and Keeling, though it were not holden a Star-Chamber Caſe, that he did ſue his Fellow Surety for Contribution, in the Name, and by the Conſent of the Creditor, though he himſelf had ſatisfied in a Sort the Debt, becauſe it was a juſt Ground of Equity, that the Sureties ſhould be equally charged, and it is ſo commonly uſed in the like Caſes, yet he was fined 50 l. for uſing the King's Proceſs
Yelv. 28. Accord. and Prerogative without Warrant of Court, or Party intereſſed, he himſelf having no Intereſt in it, but by that indirect Means defrauding the Plaintiff of his Liberty of Defence of Houſe, againſt his private Debt.

Eſcape. (342) Caſely *verſus* Weſton.

2 Cr. 532. 5 Co. 31. b. EZechiel Weſton, late Sheriff of Radnorſhire, was fined at the Suit of Caſely, for that having a Cap' Utlegat' after Judgment delivered unto him againſt one Bradſhaw, being in View when he was attending upon the Judges of Aſſiſe, from the Church to the Hall, he did not endeavour preſently to take him, whereby he then eſcaped. But it did alſo appear that having Means afterwards to take him, he did it not, but took his Word to ſave him harmleſs.

(343) Lancaſtell *verſus* Sidly.

2 Cro. 545. m.

Error for want of Bail in the King's Bench, how it ſhall be aſſigned for Error, Br. Error, 37. An. 38 Cr. Jac. 225, 568. Cr. Jac. 545. Ant. 210. 5 Co. 3. b. Hutt. 78. Poſt. 272, 281, 265. Pop. 145. STephen Lancaſtell Executor of Richard Lancaſtell, recovered in the King's Bench, againſt Sir Ralph Sidly 100 l. Debt, who being taken in Execution eſcaped, and Stephen Lancaſtell brought an Action of Debt againſt Sir George Reinolds the Marſhall in the Debt & Detinet, and had Judgment: Whereupon a Writ of Error brought, and George Crook inſiſted upon Hiſcock's Caſe, cited in Hargrave's Caſe, Co. lib. 5. 31. Judgment was given in the King's Bench, and Errors were aſſigned, that there were neither Bail nor Bill filed there. We agreed that the Error muſt be aſſigned, that there was neither Bail, nor the Party in Cuſtody of the Marſhall; for if he be, I may declare againſt him, for that is natural, all Declarations being Cuſtodia, &c. and the Bail is but a Fiction of the Marſhall's Cuſtody, and ſo known to the Courts; for otherwiſe it was againſt the Record to aver that he were not in Cuſtody, being ſo laid and anſwered to.

Caſe. (344) Willis *verſus* Woodhouſe.

Jenk. Cent. 299. Error Br. 37. WIlliam Willis brought an Action upon the Caſe upon a Trover and Converſion of Goods, againſt William Woodhouſe in the King's Bench: The Defendant pleaded Not Guilty, and the Plaintiff had a Verdict and Judgment. The Defendant brought a Writ of Error, and aſſigned two Errors: The one, that there was no Bill filed: The other, that there was no Bail. And upon a Certiorari in that Caſe awarded and returned, it was certified that there was neither Bill nor Bail filed, and the Judgment notwithſtanding the ſaid Errors, was affirmed in Camera Scacc. Tr. anno 17. Dom' Regis, viz. 5. die Julii in eodem Term', and the Record and the Proceeding on the ſame Writ of Error were remanded eod. Ter. in Banco Reg qu. vide tr. 16. Rs. rot. 945. in Banco Regis ubi tam prim' judicium quam ſecundum intratur.

Want of { Bill. Bail. } 2 Cr. 223.

Yel. 165. Po. 265. Ant. 130. Accord. 2 Cro. 109, Cro. 282. 2 Cro. 186. Poſt. 281. Acced. Jones 304. Pl. 38. a. Ant. 134. 281. 2 Cro. 108, 109. 186, 580.

1. The Want of a Bill being the Original, was taken to be within the Meaning and Intent of the Statute of 18 Eliz cap. 14. and remedied by the Equity of that Statute.

2. The Want of the Bail was not material, becauſe it might be that the Defendant was in cuſtodia Mar. at the Time of the Plaintiff's Bill exhibited, according as the ſaid Bill ſuppoſeth.

2 Cr. 223. Mo. 694. Ant. 264.

(345) Edwards *verſus* Graves. Tr. 17 Jac. Rot. 895.

Prohibition. Tr. 7 Jac. It is no Legacy where Land is appointed to be ſold by Executors, and the Money to be diſpoſed to certain Uſes. Court Eccleſiaſtical cannot hold Plea in Equity, but meerly of Cauſes according to Law. Bruſ. 32, 39. Roll. 2d Abr. 284, 285. 1 Cr. 396. 7 Ben. 21. Aſſets, enter Br. 10. Dyer, 151, 264. 2 Cro. 279. Plowd. 120. 1 Bulſt. 154. Pop. 59. 1 Le. 87. Swinb. 18. Cr. Car. 359, 396. Syd. 46. 1 Ro. 920. 2 Le. 119. 1 Le. 225. 1 Cr. 595.

PHilip Edwards, Executor of Philip Edwards, had a Prohibition againſt John Graves; and the Caſe was, that one Agnes Salter deviſed, that the Executor and three others ſhould ſell certain Lands, and ſhould diſpoſe the Money to the Defendant and three others equally; the Land was ſold accordingly, and the now Defendant ſued this Executor in Court Chriſtian, for the fourth Part of the Money. The Court held, that neither the Land nor Money was Teſtamentary as this Caſe is, for it was not Aſſets to Debts, but a Sum ariſing of Land, and appointed to ſpecial Uſes in way of Equity, and not as a Legacy, and therefore is not to be ſued for here, but in Court of Equity; neither can that Court hold Plea of a Legacy in Equity; but where it is a Legacy in Law indeed, for they muſt hold Plea by their Law, as our Courts of Law do. Yel. 39, 93. Co L. 111. a. 8 Co. 95. a. 10 Co. 47. a. Yel. 115, 160, 173. Ant. 188. Pop. 59.

(346) Twiſſe *verſus* Cotton.

Replevin.

Dower againſt a Tenant for Life, a Fine of the Reverſion how it works upon it.

THe Caſe was, Tenant for Life, the Reverſion in Fee of Land whereof the Demandant had Title of Dower, and brought a Writ of Dower againſt the Tenant for Life, hanging the Writ in the Reverſion, levied a Fine with Proclamation of the Reverſion; the Tenant for Life died, the five Years expired, and now the Demandant brings a new Writ of Dower againſt the Tenant in Poſſeſſion.

(347) Reynolds *verſus* Okeley.

Replevin.

Diſtreſs of Beaſts eſcaped, for Rent. 1 Brul. 170. Dyer, 317, 318. a. 1 Ro. 668, 672. Co. L. 47. b. 7 H. 7. 2. 2 Leo. 7. 1 Inſt. 47. 2 Saund. 290.

THe Defendant avowed for Rent reſerved upon a Leaſe for Life, the Plaintiff pleaded in Bar, and conveyed himſelf Title to 10 Acres adjoining, and that he put in his Beaſts, and they eſcaped into the Place, &c. and he freſhly followed to drive them out, but before he could recover them, the Defendant diſtrained them. The Caſe had been ſomewhat better, if the Tenant ought to maintain the Fence.

(348) Sir Chriſtopher Heydon *and* Goodhall.

Replevin.

Sureties in a Replevin. Cr. Car. 59.

IN a Replevin, Goodhall avowed for Rent reſerved upon a Leaſe for Years, and had Judgment to have retor. irrepleg. and Damages and Coſts adjudged. The Plaintiff brought a Writ of Error, and had a Superſedeas; and it was moved for Goodhall, that Heydon might find Sureties according to the Statute of 3 of the King. But the Court reſolved, by the Meaning of the Statute he was not to find Sureties. But if the Avowant had brought an Action of Debt for Rent, and had Judgment, it had been within the Law, for the Words are, &c.

(349) Chandler *verſus* Thompſon.

Obligation.

Execut. for Time, how he ſhall plead when his Time is expired. Cr. Car. 79. Syd. 57.

CHandler againſt Thompſon Executor of Marlet, Debt upon an Obligation of the Teſtator. The Defendant pleads, that the Teſtator made him Executor 'till one John Marlet ſhould come to 21 Years of Age, and in the mean Time to keep all his Goods for him, and then to deliver them unto him, and the ſaid John Marlet then to be Executor; and ſhews, that before the Writ John Marlet was 21 Years of Age, and that he delivered him the

Goods, which he accepted, abſque hoc, qd. ipſe eſt vel dic' impetrationis &c. fuit Executor, &c. It was debated by the Court, if the firſt Executor ſold or waſted the Goods, how the Creditor ſhould relieve himſelf for thoſe Goods, the new Executor taking upon him the Executorſhip; for the Goods never came to the Hands of the new Executor, though perhaps he may have an Action againſt the former Executor, for ſo much as he did not lawfully adminiſter; for againſt the Vendees he can have no Remedy, or elſe the old Executor may remain an Executor ſtill for that Purpoſe, the other being none in effect for thoſe Goods, like the Caſe of a Sheriff that doth not deliver his Priſoner, that he hath in Execution, to the next Sheriff.

Executor for a Time waſteth his Goods, how the Creditor ſhall be relieved after his Time expired. Cr. Car. 89. Noy 86.

Prohibition.

(350) Fawkner *verſus* Andrews.
Tr. 17 Jac. Rot. 864.

Diſmes charged of the Tythe of Wood in the Wilde of *Suſſex*.

IN Prohibition the Parties be at Iſſue upon a Cuſtom de non decimando of Wood, infra Wildam Suſſex. It was moved by Finch, whence the Ven. fac. ſhould be, and the Court directed, that the beſt was de corpore com. for Wilde is no Viſne, whereof the Court can take Knowledge, unto this Towſe for the Defendant aſſented; theſe kind of Aſſents would be entred upon Record.

Breve de recto.

(351) Plat *and* Holford.

Meſme Ca. 6 Co. 3. b. 2 Cro. 464. m' 2 Roll. Rep. 14.

IN a Writ of Right between Plat Demandant, and Holford Tenant, the Tenant pleaded, that he was within Age, and in by Deſcent; and prayed, that the Parol might demur 'till his full Age. Whereunto the Demandant replied, that he was ſeiſed 'till the Tenant diſſeiſed him, and traverſed the Deſcent, and Day was given to the Tenant to adviſe what he would do.

(352) Waterer *and* Freeman.

Ant. 205. Noy 23. Ro. 34.

THe Caſe of Waterer and Freeman ſup. was this Term judged for the Plaintiff, and the reſt of the Judges deſired me to deliver the Judgment and Reaſon, wherein I firſt obſerved, that the Money was not twice levied, nor the Plaintiff twice charged with the Damages, as the Declaration ran: For the firſt was, pro defectu emptorum damna parata habere non poſſum, but yet it appears by the Declaration, that he was twice vexed and grieved, and that wilfully by the Defendant, who had firſt one Execution inchoate, which he ought to have followed knowing it, and not to have taken another, for elſe he might take 20 Executions, and take away his Milch-cattel, or his Plough-beaſts: But now the Jury muſt give Damages according to the Loſs.

2 *Fieri fac.* upon Judgment.

But if the Defendant in this Caſe had not known of the Cattle firſt taken, he had not been liable nor ſubject to this Action.

1 Saund. 132. Yelv. 117. 4 Co. 14. Hutt. 113. e. Cro. 432. Dyer, 285. a. Roll. 1. Abr. 34.

But now to the main Point, we hold, that if a Man bring an Action upon a falſe Surmiſe in a proper Court, he cannot bring an Action againſt him and charge him with it as a Fault directly, and ex diametro, as if the Suit it ſelf were a wrongful Act, for Executio Juris non habet injuriam. And as all by Nature is good, ſo Saint Paul ſaith, the Law is good if a Man uſe it lawfully; ſo the Abuſe of Law is the Fault. Therefore 11 Eliz. a Man brought a Writ of Forgery, of Faux faits; the Defendant, though he be found Guilty, could not have a Scandalum Magnatum, and lay the Charge contained in the Action to be the Scandal, ſo 43 Edw. 3. 33. the Plaintiff brought an Action of falſe Impriſonment; the Defendant pleaded, that he cauſed him to be impriſoned upon a Statute. The Plaintiff replied, that there was a Day given him upon Defeaſance to pay the Money, and that he paid the Money before the Day limited; and yet it was ruled againſt the Plaintiff, becauſe he was impriſoned by Courſe of Law.

6 Co. 13. b. Yel. 38. Co. L. 207, a. 291. a. 9 Co. 79. b. Po. 267.

And ſo We rule it every Day, that if a Man be impriſoned upon a formal Suit, though there were no juſt Cauſe of Suit, yet if he give a Bond for

for his Releaſe, he ſhall not avoid it by a Dureſſe, for it is incarceratio legitima, that is by Law, though the Plaintiff did untruly procure it. 2 Cro. 187. ultra. 3 Le. 239, 330.

But now on the contrary Part, if you charge me with a Crime, in a Court that is no way capable of the Cauſe, I ſhall have Action for it, and lay that very Complaint to be the Slander, as it is reſolved, Coke l. 4. 14. In the Caſe of Buckley againſt Wood, for a Charge of Piracy or Felony, in the Star-Chamber, for that is ſcandal' temerarium, as if it were ſpoken elſewhere, the Star-Chamber being as no Court to that Purpoſe. So I hold, if a Man ſue me in the Spiritual Court for a meer Temporal Cauſe. 8 E. 4. 3 Cro. 836. 2 Cro. 134. 1 Roll. 34. 2 Cro. 432. 3 Cro. 230, 247. 2 Cro. 134.

Now to the principal Caſe, if a Man ſue me in a proper Court, yet if his Suit be utterly without Ground of Truth, and that certainly known to himſelf, I may have an Action of the Caſe againſt him for the undue Vexation and Damage that he putteth me unto by his ill Practice, though the Suit it ſelf be Legal, and I cannot complain of it, as it is a Suit, as in the Caſe before; and therefore the 16 of E. 3. Fitz. Deceipt 35. a Conuſee of a Statute ſued Execution againſt his Deed of Defeaſans, whereupon the Conuſor had an Action of Deceit againſt him and his Aſſign, in the Nature of an audita querela. So note the Diſtinction upon this Caſe, and 43 E. 3. before. If a Man ſue me, and hanging that Suit commence another againſt me, to this I have a Plea in Abatement, which proves this latter Suit unjuſt and vexatious: But if he diſcontinue the former, he may bring a new Action. Likewiſe I hold, that I may have an Action upon the Caſe againſt him that ſues me againſt his Releaſe, or after the Money duly Paid; yea though it be upon a ſingle Obligation. So where one doth bargain and ſell his Land at the Common Law, and refuſe to make Aſſurance accordingly, and after conveyeth the Land to another, who hath knowledge of the firſt Bargain, the firſt Bargainee may have an Action upon the Caſe, or Deceipt as well as Subpœna, whereupon Fairfax 21 E. 4. 23. ſaith well, that if Men will be good Pleaders, there ſhould not be Cauſe of ſo many Suits in Chancery. But now two Cautions are to be obſerved to maintain Actions in theſe Caſes. Cr. Car. 291. Cr. Jac. 134, 667. Ant. 206. Dy. 285. 4 Co. 14. b. 2 Cr. 191, 490, 601. Ant. 266. Yel. 20, 11 Co. 87. b. Cr. Jac. 507. Jones, 196. Cr. Car. 141. 2 Cr. 506. 3 Cro. 107, 386.

The firſt, that the new Action muſt not be brought before the firſt be determined, becauſe 'till then it cannot appear that the firſt was unjuſt, which is the Reaſon given by the Judges 2 R. 3. and that is the Reaſon that a Writ of Conſpiracy lies not 'till the Plaintiff be lawfully acquitted. The other Rule is, that there muſt be not only a Thing done amiſs, but alſo a Damage either already fallen upon the Party, or elſe inevitable. And therefore 19 H. 6. 44. If a Man forge a Bond in my Name, I can have no Action upon the Caſe yet, but if I am ſued, I may for the Wrong and Damage, though I may avoid it by Plea, but if it were a Recogniſance or Fine, I ſhall have a Deceit preſently before Execution. For quæ in continenti, vel certo fiunt, ineſſe videntur, 43 E. 3. 20. Deceipt againſt one that procured a Formedon by Colluſion. Yel. 117. Ant. 6. 2 R. 3. 9. b. 9 Co. 55. b. 2 Cr. 490. 4 Co. 18. b. Cr. El. 197. 2 Cr. 61.

(353) Fleetwood *verſus* Curley.
Hill. 16 Jac. Rot. 1197.

Milles Fleetwood Knight, brought an Action upon the Caſe againſt Francis Curley Eſquire, and declared, that whereas the King, by his Letters Patents, An. 7. did make him general Receiver of the Court of Wards during his Life, which Office he had juſtly executed ever ſince; that the Defendant the 16 of K. Jac. having ſpeech with one Whorewood of the Plaintiff, did ſpeak of the Plaintiff theſe Words, M. Deceiver (Innuendo the Plaintiff) had deceived and cozened the King, and dealt falſly with him, and I have him in Queſtion for it, and I doubt not but to prove it ere it be long. Upon Iſſue not Guilty, it was found for the Plaintiff before me at Guildhall; in Arreſt of Judgment it was ſaid, that it doth not appear by the Words ſpoken, that they were ſpoken of the Plaintiff; for M. Deceiver had no Propriety to that Purpoſe, and then the Innuendo will not make it certain, when it appeareth to the Court that the Words will bear no Certainty. London. Waller. Action for Words, Mr. Deceiver hath deceived and cozened the King. 1 Roll. 82. 2 Ro. R. 148. 2 Cro. 557. Godb. 341. Mod. R. 23. Heth. 139, 143.

Secondly, it was objected, that he did not ſay, that the Plaintiff did deceive the King in his Office; yet the Court, after divers Arguments, gave Judgment for the Plaintiff. And as to the firſt Exception it was agreed, that if a Man ſhould ſay, looking upon three Perſons, one of theſe three murdered a Man, no Innuendo will help this Incertainty, no more in the Perſon than in the Matter of the Scandal.

2 Cro. 102, 107. 3 Cro. 497. 4 Co. 17. a. Ant. 52. 4 Co. 17. b. Alein, 32.

P. 13 Jac. Harvy brought an Action againſt Ducking, for ſaying, that he had forged a Writing, Innuendo a Bill of Debt, ſetting down in the Innuendo all the Circumſtances; and though he had a Verdict, yet could have no Judgment. But here it is ſaid, that at the Time of the Words the Defendant had ſpeech of the Plaintiff, and expreſly that he ſpake theſe Words of the Plaintiff. And then the Word Deceiver, though in Propriety it doth not import Receiver, yet the Alluſion and ironical Reſemblance of the Name doth very well bear the Application of the Innuendo, and if ſuch a ſlight Evaſion ſhould be admitted, it would be a common Practice with crafty Wits, to ſlander ſafely. And if he had ſaid, M. Receiver, there had been no Doubt.

Yelv. 21. Accord. Devant, 45. 2. 3.

And as to the ſecond Point, it was likewiſe agreed, that Words of an ambiguous Senſe ſhall receive the beſt Senſe, as (Pox) not the French-Pox, and 12 Jac. Miles brought an Action againſt Jacob, for ſaying, he had poiſoned one Smith, and had Judgment in the King's Bench; but we reverſed it, becauſe it might be againſt his Will. It was alſo agreed, that if the Plaintiff ſhould have added an Innuendo, that the Deceit was in his Office, it would have been nothing available. But the Court reſolved, that upon the whole Caſe here the Words muſt be underſtood of themſelves by Conſtruction of Law of his Office, for Words Ambiguous muſt alſo be of indifferent Senſe that ſhall be indifferently taken.

Ant. 6. 89, 776. Yel. 21. 4 Co. 17. a. b. 2 Cro. 343. Ant. 6. 1 Roll. 77. 2 Cro. 438. Utra.

But when there is a pregnant, violent and certain Senſe that may lead the Court and Hearers to take it one way, that ſhall be taken, and not another imagined, whereof there is no Appearance. So here when you ſay of the King's Receiver, that he deceived the King, it muſt be underſtood in that wherein it appeareth that he may deceive him, and not to take it at large when no other Meaning appears; and therefore not like the Caſe of Pox, or Poiſoning before mentioned, otherwiſe if he had ſaid, that he had been a common Deceiver, without applying it to the King certainly, whoſe Officer he is. Mic. 11 Jac. Yardly being an Attorney, brought an Action againſt Ellis, and declared, whereas he was retained by one Bancroft againſt the Defendant, he ſaid of him to Bancroft, your Attorney is a bribing Knave, and hath taken Twenty Pounds of you to cozen me, and had Judgment; for it ſhall be taken ſpoken of him as an Attorney. And Mich. 14 Jac. Box an Attorney brought an Action againſt Barnaby for calling him Champerter, and had Judgment. And its not Material that its not alledged in this Caſe and the others, that the Hearers did know him to be the King's Receiver, and the others to be Attornies, and yet it were not actionable, if it were not ſo; and the Slander and Damage conſiſt in the Apprehenſion of the Hearers, and therefore ſlanderous Words in Welſh bear no Action, except you affirm, that they were ſpoken in the Hearing of them that underſtood the Welſh Tongue: But when ſlanderous Words are ſpoken, which are a Wrong, the Doers are anſwerable for all evil Events and Damages. Now the Hearers may come to the Knowledge, or others to whom they ſhall report the Words may know, that they are Perſons of that Condition that make the Words actionable, which in the Caſe of Welſh Words cannot be ſo underſtood in any reaſonable Poſſibility.

Brnl. 6. Yel. 32. Ant. 76. 8, 9 1 Roll. 53. Moor, 855. Alein. 13.

1 Roll. Abr. f. 53. Ant. 117. Moor, 867. 1 Brnl. 6.

3 Cro. 496.

Ant. 82, 191.

Crane

(354) Crane *verſus* Taylor. Covenant.

Tr. 14 Jac. Rot. 3491.

JOhn Crane brought an Action of Covenant againſt James Taylor Doctor of Divinity, and one of the Prebendaries of Ely, and the Caſe was, that Doctor Tindall Dean of Lincoln, and this Defendant, and all others the Prebendaries there, by their ſpecial Names, had covenanted jointly and ſeverally, to make a Leaſe of an Inn called the Bell within Newgate unto Crane, which Leaſe and Covenant was by Demurrer in Law argued to be void, upon the Statute 11 Eliz. but the Caſe was judged for the Plaintiff, that the Covenant was good in Law, becauſe it was not within the Statute 18 Elizabeth, being concerning a Houſe in London; for though the Stat. 13 Eliz. Chap. 10 be general againſt all Leaſes and Grants, other than for Twenty one Years, and three Lives of all the Poſſeſſions of Deans and Chapters, &c. Yet there is a Statute of 14 Eliz. Chap. 11. which is ſhuffled into an Act of Continuance of Statutes, that enacts, that that Statute 13 Eliz. (naming it) ſhall not extend to any Houſes in Cities or Towns, &c. but that the ſame may be granted, demiſed or aſſured, as they might lawfully have been before, and as if that Stat. had not been made, ſo that Stat. ſets all looſe touching ſuch Houſes in Cities as againſt the Stat. of 13 Eliz. and therefore that Stat. of 14 Eliz. Chap. 11. makes a new Law of it ſelf for them, that no Leaſe ſhall be made of them in Reverſion, which was not reſtrained by the 13 Eliz. as appears by the Stat. of 18 Eliz. which provides for that Miſchief, as not provided for before. Alſo the Stat. 14 Eliz. Chap. 11. forbiddeth Alienations of ſuch Houſes, except there be full Recompence given to the Church at the ſame Time, ſo as with ſuch Recompence they may alien in Fee, which was not permitted by 13. Then comes the Stat. of 18 Eliz. which recites, that ſince the Making of 13. divers Leaſes were made, long before the Expiration of the Former, againſt the Meaning of the Stat. 13. and enacteth, that all Leaſes made of Lands, whereof any former Leaſe was then in Being, and not to be ended within three Years ſhould be void, and that all Bonds and Covenants for making Leaſes againſt the Intent of 18 or 13 Eliz. ſhould be void, ſo this Stat. toucheth not the Stat. of 14 Eliz. which permitted not Leaſes in Reverſion at all, nor was named or mentioned in this Stat.

Cambridge. Goldsborough. Winch. Ent. 148. Co. L. 44. a.

Statute 18 Eliz. Church Leaſe and Covenants for them extend not to Houſes in Cities, &c.

(355) Wilden *verſus* Wilkinſon. Obligation.

Paſch. 16 Jac. Rot. 2363.

JOhn Wilden brought an Action of Debt againſt John Wilkinſon upon an Obligation of 100 l. the Condition was to ſave the Plaintiff harmleſs from all Actions and Damages that might ariſe upon the Releaſe of the Defendant out of Execution (being then in Execution at the Plaintiff's Suit) from all Perſons that might trouble him concerning the ſaid Releaſe.

The Defendant pleads, that the Plaintiff levied a Plaint in the Court of York againſt one Nuttall for a Debt of an Hundred Pounds, and that he and one Hart became his Bail, that the Plaintiff had Judgment againſt Nuttall, and alſo againſt the Bail; and this Defendant was thereupon taken in Execution, and the Plaintiff releaſed him, which is the ſame Releaſe in the Condition, and ſo concludes, that he did ſave him Harmleſs, &c. The Plaintiff replies, and confeſſeth the Plaint, Bail and Judgment ut ſupra, but ſaith further, that before the Defendant was taken in Execution, Hart the other Bail gave him Security for his Money, and in Conſideration thereof, the Plaintiff promiſed Hart that he might take out and lay the Execution upon the Defendant, and that he would not releaſe him without the Conſent of Hart: Whereupon Hart procured him to be taken in Execution, and then moved the Plaintiff to diſcharge him, who acquainted him with his Promiſe to Hart ut ſupra, and thereupon the Defendant made him this Bond, with Condition prout, and then ſhewed, that thereupon he diſcharged him: And Hart

Civit. Eborum. Goldsborough. Condition of an Obligation expounded by a Matter *dehors*. 1 Roll. 432. Winch. Ent. 271. or 280. Ant. 263.

Ant. 264.

Hart brought his Action for Breach of the Promise in the King's Bench, and recovered an Hundred and Fifty Pounds Damage, & sic damnificatus, whereupon the Defendant demurred in Law, and Judgment was given for the Plaintiff, against the Opinion of Hutton, who thought that the Condition was to be understood only by the Word of Damage directly growing by the Release, and not by any collateral Act dehors, as is this Promise. But the Reason that moved the Judg. was, that this Condition did carry a forcible and apparent Intent of saving harmless of some Damage that might arise, not upon the Release alone, but upon some external and collateral Thing besides the Release, and yet by the Means and Occasion of the Release: For the Words are, to save harmless, &c. from all Persons that might trouble him concerning the said Release. Now, no other Person could molest or trouble him for the Release of his own Debt only, wherein no Man could have to do but by means dehors; and where it was said the Replication was but Matter of Equity, it is not so, but it was a necessary Part in Law to make it appear to the Court, that this Breach was within the Condition, which was otherwise general, and to be taken as Hutton took it, and as the Barr is, and the declaring of this Promise to the Defendant, whereupon he gave the Bond, doth also somewhat help the Case, though I am of Opinion it would have served without it, for he takes upon him at his Peril to defend him against all Damage concerning the Release. Now Hart's Action was exactly laid according to the Promise, for otherwise there could have no lawful Damnification.

Star-Chamber.

(356) Courteen's Case.

1 Ro. R 299. Pop. 149.

YElverton Attorney-General exhibited a Bill in the Star-Chamber against William Courteen, and seven or eight Score Dutchmen, for buying and transporting of sundry great Sums of Money, since the Beginning of the King's Reign; and laid his Bill, that they had jointly and severally bought and transported great Sums in general, naming no certain Sum, that is to say, William Courteen so much certain, and every one after another his Portion certain. Upon this Bill Delew, one of the Defendants, demurred in Law, because this Offence was made by Law penal, and therefore ought to be sued within the Time prefixed for penal Laws.

Ant: 171.

Again, the Statute gives for this Offence Forfeiture of Body and Goods, and so makes it Capital. This Demur was referred to the Chief Justice, and to me, over-ruled it.

Transportation of Money is an Offence against the Common Law. 4 Inst. 66. Statutes that give Forfeiture of Body extend not to Life. Post. 293.

To the first, the Bill was laid not as an Offence against a Statute, but against the State-Policy and Safety of the Kingdom, and so punishable and not permitted by the Common Law.

To the second, we resolved clearly, that no Statute could be extended to Life by doubtful and ambiguous Words, and therefore the Forfeiture of the Body shall be understood the loss of Liberty, and Use of his Body by Imprisonment.

This Case the Attorney brought to Hearing against divers, and served some of them with Proces ad audiendum Judicium, and some not.

Many several Bills though but in one Writing.

Now though the common Rule of Star-Chamber is, that if one Defendant be served to hear Judgment that it serves for all; yet in this Case it was resolved upon Debate, that it could not be so. For Precedents of Courts as well as Laws are built upon Reason and Justice, & tant' habent de lege quant' habent de Justitia. Now in this Case, though there is but one Writing or Bill against all the Defendants, yet it is as many Bills as Defendants, because they are so many several Parties and Offences; for though he did lay the Offence, first jointly and severally, yet that is corrected or explained by the several Application of a distinct Portion to every Person, and so the Word Joint is frustrate, and so there is no Reason that the Serving of one Defendant should make another Answer, that hath nothing to do with him or his Cause, for it is not the Parchment, but the Matter that makes one or sundry Bills.

Ant. 171.

In

In this Suit moſt of the Defendants had pleaded in Bar not Guilty, and afterward in their Rejoinder had pleaded the Pardon by Parliament, 7 Jac. which did extend to buying of Money, but not to tranſporting; whereupon two Queſtions aroſe:

Pardon general pleaded in Rejoinder after not Guilty. cap. 24.

Firſt, whether ſo many of the Defendants as were neither Naturalized nor Indenized, were capable of the Pardon.

Secondly, whether it were receivable, not being pleaded in Bar.

To the firſt it was urged, that the general Pardon in the Preamble, and in all Parts, uſeth the Words of Loving and Obedient Subjects; whereupon the Chief Juſtice did in a Manner expreſly hold them out of Relief. But I did avoid that Queſtion, as being not neceſſary, for we all agreed, that it did no good in the Re-joinder for theſe Reaſons.

Pardon General, whether it extends to Aliens.

1. Not Guilty, is the proper and perfect general Iſſue, and needs no Rejoinder.

2. Secondly, Rejoinder muſt not meerly depart from the Bar, as this doth and more, for it implieth a Contradiction, the one innocent, the other pardoned as nocent.

3. Thirdly, upon Anſwer, which is upon Oath, the Defendant is examined upon Interr. and both make but one Anſwer: But upon the Rejoinder which is without Oath he is not examined, and yet he pleads Matter of Fact that he is none of the Parties excepted, and ſo againſt the Courſe of the Court, he pleads without Oath Matter to bar the Suit.

But to the other Point, I told the Attorney-General, that I held the Dutch living here within the King's Protection, being of a Friend Country, to be alſo truly under his Subjection, and therefore capable of the Title of his Loving and Obedient Subjects; but they are not Capable of the diſtinct Title of Natural Subjects, which is uſually in Statute ſet in Oppoſition againſt Denizens and Strangers. And therefore if ſuch a Stranger in Amity commit Treaſon here, the Indict. ſhall conclude cont. debitam allegiantiam, and ſhall call the King Dominum ſuum, but not naturalem Dominum.

Dyer, 144. 7 Co. 6. a. Accord.

And beſides, the General Pardon hath reſpect of Retribution for the Subſidy, wherein though the Strangers be no Grantors, yet they pay more then we, and in a ſort may be called Grantors, for by living here they do tacitly ſubmit themſelves to our Laws, and Forms of Law-making, and ſo their Grant and Conſent is involved in the Conſent of Parliament. And though they be not admitted to the Choice of Knights and Burgeſſes, that moved not, for no more are the Engliſh themſelves that are not Free-holders. And I think no Judge will doubt but that ſuch a Stranger ſhall have the Benefit of ſuch a Pardon againſt common penal Laws, and other common Offences. But if the Stranger were not in the Kingdom at the Time of the Pardon made, then he were not within the Benefit, for he is no otherwiſe a Subject but by his Reſidence here.

(357) Hollis's Caſe. Star-Chamber.

The Attorney-General did inform againſt Sir John Hollis, L. Houghton, for that upon a Petition exhibited againſt him to the King by Sir Edward Coke, for ſtirring up one to ſcandalize and ſue him in the Star-Chamber; the King referred the Examination of it to four of the Lords of the Council, who having called and examined him, did thereupon enjoin him upon his Allegiance, that he ſhould diſcloſe nothing that had paſſed in his Examination, and that yet he had in Contempt of that Command diſcloſed ſome of it to ſuch and ſuch, and named to whom, to inſtruct and prepare them to ſuppreſs the Truth.

To this the L. Houghton demurred in Law, and aſſigned for Cauſe, that this Command was not binding, becauſe it was not as from the Body of the Council, but from particular Committees for one ſpecial Purpoſe. But the Demurrer Was over-ruled; firſt materially, in that the Preparation of Witneſſes

Council-Privy their their Authority.

Witnesses to suppress Truth is a full Charge of it self, ... for the Star-Chamber, and to be answered. And it was further condemned as Presumption to weaken the Union of a select Number of Councellors, chosen and appointed by the King himself; and therefore Serjeant Ashley and Hughs of Grayes-Inn, that were of his Council, were ordered at the Council-Table to make a Submission, which they did.

Princes Allegiance not to be imposed but in Case of Allegiance.

But touching the injoining Secresie upon Allegiance in this Case, I delivered my Opinion publickly in my Sentence, that the Obligation of Allegiance was not to be applied, nor laid upon private Causes, for no Man could make a Cause of Allegiance other then such as the Law makes, and as concerns the Faith and Loyalty, that the Subject oweth to his Soveraign in Points of State.

Star-chamber.

(358) Meyre's Case.

Bill of Forgery in the Star-chamber, fails by adding somewhat that is not in the Writing. M. 17 Jac.

The Attorney-General did inform against John Meyres in the Behalf of the Lord Digbie supposing that he had forged a Lease of divers Lands, Parcel of the Possessions of Sherborne, being now his in the Name of Sir Walter Rawleigh, when he had it.

The Case now coming to hearing, and being heard, it now fell out that the Information said, that the Lease was of divers Things by Name, whereof one Piece of Ground called Long Meare was one. Now the Lease pretended, and supposed to be forged, being produced, the Ground called Long Meare was not contained in it, neither by Name nor by general Words, but all the rest of the Things were in it.

Now the Defendant pleaded to the Forgery not Guilty, and so the Court adjudged that as the Bill was laid he was not Guilty, for it is not the same Lease, and it was an unnecessary Curiosity and Specialty that marred the Case, for being of a Stranger's Act, if it had been at the Common Law, he might have made his Information general, that the Forgery had been of some one Parcel whereof he had been most certain (for some Parcel certain there must be) inter alia as hath been formerly adjudged and ruled in Patrick and Coke's Case to the like Effect.

5 Case.

(359) Lancastell *versus* Sidley.

Jenk. Cent. 300. Post. 282. 1 Cr. 225. 2 Cro. 545.
Debt upon Escape, by Executor must be in the *detinet*. Hutt. 79. Ant. 264.

Stephen Lancastell, Executor of Richard Lancastell his Father, did recover by a Judgment in the King's Bench, against Sir Ralph Sidley, a Debt of 100 l. upon an Obligation made by the said Sir Ralph Sidley to the said Richard, and 4 l. for Costs. Sir Ralph Sidley afterwards was committed to Sir George Reinolds, being Marshall of the Marshalsey, in the Execution of the said Debt and Costs, who suffered the said Sir Ralph Sidley to escape, the Plaintiff being not satisfied of the said Debt and Costs; upon which Escape the said Stephen, as Executor of the said Richard, brought an Action of Debt of 104 l. against the said Marshall, and declared in debet and detinet and upon non permisit ire ad largum pleaded by the said Marshall. Stephen Lancastell the Plaintiff had a Verdict and Judgment against the said Marshall, for 104 l. Debt, and 10 l. 10 s. Costs.

The Marshall upon a Writ of Error assigneth for Errors.

5 Co. 31. b. Ant. 38, 264. 2 Cr. 394. 3 Cr. 326. 1 Ro. R. 19, 63, 78. 2 Cr. 546, 685. Ant. 38, 218. 16, 17, Car. 2. cap. 8. 2 Cr. 36, 299. Ant. 233. 2 Cr. 409, 412. 3 Cr. 551, 592. Cr. Jac. 300.

1. That the said Action, brought against him by the said Executor, ought to have been in the detinet only, and not in the debet and detinet. Vide Co. lib. 5. 31.

2. That the said Executor in his Declaration against the Marshall hath not shewed for the Will of the Testator his Father, but concludeth his Declaration with Et inde producit sect' and doth not say, Et profert hic in Cur. Literas Testimentarias pred' Rich. Lancastell, &c. the Judgment is reversed in the Exchequer-Chamber.

Earl

(360) Richard Earl of Clanrickard, and the Lady Frances his Wife, *versus* Robert Sidney, Viscount Lisle. Mich. 13 Jac. Rot. 122.

The Demandant brings a Formedon in the Reverter of Lands Ewhurst and Salehurst, and declares, that Robert Earl of Essex, and Frances his Wife, 33 Eliz. levied a Fine thereof to Gerrard and Mils, which Fine was to the Use of Elizabeth Sidney in Tail, the Reversion to the Lady Frances the Demandant, and her Heirs, and that Elizabeth is dead without Issue, and that the Right of the Tenement is reverted to the Lady Frances, per formam doni: The Tenant vouches Richard Glyde and Kenrick Parry. The Vouchees confess the Seisin, Fine and Use, ut supra. But they further say, that Elizabeth married Roger E. of Rutland. That the Earl of Essex died, and the Demandant intermarried; and that they, for the Consideration of Money, did levy a Fine of the said Land (inter alia) unto Roger Earl of Rutland, and his Heirs, An. 3 Jac. by force whereof the Earl of Rutland was seised of the Reversion of the Tenement to him and his Heirs. And then they add, that the said Roger and Elizabeth his Wife, 7 Jac. levied another Fine of the Tenements to Caston and Screvin; which Fine was to the Use of the said Elizabeth and her Heirs; and then shew, that the Earl Roger died, and Elizabeth died without Issue, and that the Tenements descended from her to the Tenant Viscount Lisle, as her Uncle and Heir, so this last Fine was pleaded to bring the Title of the Reversion to the Tenant. But all the Case and Questions of it arise from the two Fines, 33 Eliz. & 3 Jac. saving that upon the Fine 7 Jac the supposed extinguishing of the Estate for the Life of Roger Earl of Rutland depends.

Plowden Commentaries Sup. 1. &c. 1 Brnl. 153.

Ant. 24.

The Demandants reply as to one third Part of the said Tenement, that the said Fine levied by the Demandant to the said Roger Earl of Rutland, was to the Use of the said Roger and his Heirs, during the Life of the said Lady Frances the Demandant; and as to the other Parts of the said Tenements, the said Fine was to the Use of the said Lady Frances and her Heirs.

The Vouchees rejoin to the third Part, &c. That the Use was to the Earl and his Heirs, and traverse the Limitation during Life. And to the two Parts Residue, they say, that the Use was to the Earl and his Heirs, and traverse the Use to the Lady Frances and her Heirs.

The Jury find, as to the Issue for the third Part, the Seisin of Roger and Elizabeth in Tail, the Reversion to the said Frances in Fee, and that the Demandant had no other Estate in those Lands in Ewhurst and Salehurst (so no Dower there) and then they find the Indenture 17 Jac. 3 Jac. between the Demandant and the Earl Roger for Money, containing a Demise, and Grant of their Estate of the third Part of the said Lands (inter alia) to Earl Roger and his Heirs, during the Life of the Lady Frances Demandant: And the Covenant to make and do such further reasonable Acts and Things as shall be reasonably devised for the better Assurance, Surety and sure-making of their Estate, of and in the said Premises, to the said Earl of Rutland, his Heirs and Assigns as aforesaid, and the Fine 3 Jac. upon it. And the Jury likewise finds, as to the Issue of the other two Parts, the Intail and Reversion, and no other Title of the Demandant, and the Indenture of Bargain and Sale of the third Part, and the Covenant of further Assurance, ut supra, and that there was no other Agreement to lead the Use of the Fine but the said Indenture.

In the Judgment of this Case, I have considered these Points.

1. What Quantity of Land contained in the Fine, 3 Jac. doth pass unto the Earl of Rutland unto his own Use, and of what Estate; and I am of Opinion, that there passeth but a third Part, and that but during the Life of the said Lady Frances, notwithstanding the general Covenant of the Deed.

1 Co. 110.

2. This being admitted, since the Demandants have passed a third Part during her Life away, she cannot demand the third Part, nor by Consequence the whole as she hath done, except by some Means the Estate given in that

third be determined and Extinct, which is made a ſecond Point; wherein I hold, that it is not Extinct, but that the Tenant in this Action ought to hold the third Part againſt the Demandant during the Lady's Life, and that ſhe cannot maintain her Formedon againſt her own Conveyance.

Out of this it will follow, that ſhe muſt be barred of that third Part of her own ſhewing, for ſhe hath expreſly confeſſed by her Replication, her Alienation of that third Part during her own Life, by the Fine 3 Jac.

3. But then the Queſtion is, whether ſhe ſhall be barred only of that third Part, and have Judgment for the other two Parts, or whether her whole Writ ſhall abate, inaſmuch as ſhe hath, by her own Confeſſion, falſified her Writ and Demand of the whole, as ſhe hath made it. And I hold, that the Court ought to have abated the Writ for that Cauſe.

4. The Demandants have grounded their Formedon only upon the Fine, 23 Eliz. whereby the Land was given to the Lady Eliz. in Tail, the Reverſion left to the Lady Frances, And that the Lady Eliz. is dead with Iſſue, and ſo it ought to revert per form' donationis, whereas now upon the whole Caſe it appeareth of the Demandant's ſhewing to the Court, that ſince that Gift in Tail made, the Reverſion was conveyed away by the Demandants, by the Fine 3 Jac. though returned unto her by way of Uſe, and ſo Alterations made of the Reverſion ſince the Gift in Tail.

What will be the Effect of this appearing to the Court of her own ſhewing and Confeſſion, and whether that were Cauſe to abate the Writ, is a Queſtion; and I hold alſo, that this was no Cauſe to abate the Writ.

5. What the Stat. 18 Eliz. of Jeofails will work in this Caſe upon both Faults: And I hold, that in this Caſe it cures both theſe Cauſes of Abatement. So I ſhall conclude, that for a third Part the Demandant is to be barred, and to recover the other two Parts, for ſo much as is in Queſtion upon the ſpecial Verdict, which is Ewhurſt and Salehurſt.

Clauſes in Company in a Deed, how they ſhall be expounded.

To the firſt Point, the Truth of the Caſe is, that of ſome Parts of the Land in the Deed mentioned, the Lady Frances was Tenant in Dower actual of the Endowment of Sir P. Sidney. But of the Lands of Ewhurſt and Salehurſt, which is the Land in Queſtion, upon the ſpecial Verdict, ſhe had neither Dower actual, not Title of Dower, nor any other Title, but her Reverſion in Fee, as it is found in the ſpecial Verdict.

Dy. 239. a. b.

Whereupon, 1. I hold, That for ſo much as ſhe had in Dower, that very third Part paſt by the Deed and Fine divided to the Earl of Rutland and his Heirs, during her Life, and no other Part: But where ſhe had no Dower, as of Ewhurſt and Salehurſt, the third Part of the Reverſion in Fee did paſs for her Life undivided; and ſo the Sentence, which is but one in Words, hath divers Operations, according to the Nature of the Things whereupon it works. For though the Deed and the Grant contained in it be induced with a Recital, that the Lady Frances did hold a third Part of the Manors and Lands in the Deed mentioned (whereof Ewhurſt and Salehurſt are Parts) as of Dower, &c. yet then it proceeds, that in Conſideration of Money, they, &c. demiſed and granted, &c. to the Earl of Rutland in theſe Words, all the State of them, the ſaid Earl of Clanrickard and Lady Frances, of and in all that the third Part of the Manor of Robertsbridge, &c. and all that their Eſtate of and in the third Part of all the Lands thereunto belonging, in Ewhurſt and Salehurſt. So that the Words of Grant are not bound to the Words of Dower recited, as if they had ſaid, all the Dower or Eſtate in Dower, or all her third Part which ſhe holds in Dower, but looſely and at large all their Eſtate in the third Part of the Manors, Towns, &c. So the Words being general muſt not be fruſtrate in any Part they ſhould be, if they were reſtrained only to Dower. So then there is no Cauſe to urge the Neceſſity that the general Covenant ſhould create any Uſe of it ſelf, becauſe elſe there were no Uſe of theſe Lands whereof there was no Dower; for therein you had my Opinion clean contrary. But now I hold, that no more ſhall paſs by this Deed and Fine but a third Part of all in Uſe to Rutland, though the Conuſees were ſeiſed of the Reverſion of the whole: And yet I Grant, that if a

Man

Man seised of Land in Fee, will covenant with I. S. for Money to do all Acts that he shall require for Assurance of the Land to him and his Heirs, and then levy a Fine to him, that this Covenant and Fine will give him the whole Land; for the Fine passeth the Land; and a Declaration of the Use, either express or in Law, is sufficient, and this Covenant is no less than a Declaration, and it stands in its full Strength, without any other Thing to qualifie it. So of this then would be no more Question.

But now consider this Case, which hath a Fine and a like Covenant also in Words, and yet shall pass but a third Part, whereof the Reason is the Wisdom and the Benignity of the Law, that being to judge of an Act, Deed, or Bargain consisting of divers Parts, containing the Will and Intent of the Parties, all tending to one End, doth judge of the whole, and gives every Part his Office to make up that Intent, and doth not break the Words in Pieces. 2 Cr. 172.

Now here the Deed contains the Bargain, which is a Grant for Money of all the Estate of the Earl of Clanrickark, and the Lady Frances, of the third Parts of several Things to the Earl of Rutland, by several distinct Clauses: Then follows the Habendum to limit the Estate to the Earl of Rutland (which was not before, though it might have been) in these Words, to have and to hold their Estate of and in their said third Part, &c. to the Earl of Rutland, his Heirs and Assigns, during the Life of the Lady Frances.

So these two Parts the Premises, containing the Grant it self, and the Things granted, and the Habendum containing the Estate, have done their Office clearly and without Ambiguity, and have given only their third Parts, and of a limited Estate express. Then follow two ordinary Covenants attending upon this Conveyance, one for perfecting of this Conveyance by further Assurance, the other for Well enjoying of that that is conveyed.

Now who sees not, that the Office of these Covenants (when they follow in express Grant) is not to give any thing, but to assist, further, and support, being as a Wall or Monument about it. And therefore cannot be understood to exceed that whereunto they are said to be but Handmaids, according to the Rule of the great Master: The Servant cannot be above the Master.

And because it may appear how absurd it will be, to take these Covenants as if they stood alone, without Respect to the whole Context and Intent of the Deed.

The first of these two Covenants is, that the Earl of Rutland, his Heirs and Assigns, shall at all and every Time and Times hereafter, enjoy the third Parts discharged and saved harmless of all Titles of the said Earl, or Lady Frances.

This Covenant, though it be restrained to the third Parts, yet it is not restrained to the Heirs (as aforesaid) but at large, for all Heirs of the Earl of Rutland, and at all Times, that is, for ever; yet no Man would judge this Covenant for an Heir of the Earl, after the Death of the Lady Frances; for it is against Sense and Nature, that I should Covenant that those Heirs should enjoy the Estate, that were plainly excluded from the Estate by the Limitation: Yet if this Covenant stood alone clearly, it would reach to all Heirs, and for ever, according to the Words. So you see that Clauses in Company have other Constructions, than when they are alone.

Now this other Covenant for Assurance is clearly restrained likewise to the Limits of the Bargain, by all the Parts and Words of it, as well for the third Parts, as for the limited Heirs, for these apparent Reasons.

1. First, it is joined to the former Covenant of enjoyning, under the same Line and Covenant, as depending upon it; which was expressly only of the third Part.

2. Then it is for other and further Acts.

3. Then, that those Acts must be reasonable, and reasonably devised, therefore not differing from the Bargain.

4. Then, that they must be for the better Assurance, Surety, and sure making, which are all governed by the Word (Better) and must be for the Better of that that was before.

Lastly, of the Estate (not of all their Estate; as the Council have expounded it) to the Earl of Rutland, his Heirs and Assigns, as aforesaid.

Now they that Object, prels this only Word [their Estate] and pass by all the rest that serve for Declaration and Restriction. Note, it is not [all their Estate] Case Stuckley & Butler. Hill. 12 Jac. Rot. 627. the E. of Sussex Lord of the Manor of Cleave sold to George all his Woods, Timber and Trees growing, super totum illud Manerium de Cleave, viz. upon three Coppices named, We all agreed, that if the Word totum had not been, the viz. had restrained.

Ant. 168.

Now I say, that considering all the former Parts of the Deed, being expresly for Thirds, and an Explanation of this very Covenant by the former Observations, their Estate in this Case shall be understood not the Estate at large, but their Estate granted; and much the rather, by reason of the Close of the Words as aforesaid, which (as it is confessed by the other Side) limits the Generality of the Heirs, by the Intent of the rest of the Deed. So standing indifferently in the End of the Covenant, doth likewise extend it self to the Thing and Estate given by the like Intent, and upon the same Reason, the rather because there is no violent Word [of all their Estate] so it shall be of the same Sense, as if he had said (their Estate to him and his Heirs, according to the true Intent and Meaning of these Presents) or, (their Estates in all the Lands aforesaid) to the Heirs aforesaid. But there might have been more Doubt, if the Words (as aforesaid) had been placed thus, that he should make further Assurance to him and his Heirs as aforesaid, of their Estate, &c. And yet I should not have doubted much even of that, as I observed upon the former Covenant of enjoying, that speaks of Heirs at large, without Restriction, as aforesaid; for Covenants, Conditions, Reservations, Warranties, do all wait and join to the Grants.

1 And. 236, 283. March 9. 1 Cr. 222.

And this is the very Reason of the Judgment in the Lord Russel's Case, Co. lib. 11. 51. where a Farm was demised, excepting one Close by Name, and the Lessee covenanted to repair the Fences of the Premises, and it was adjudged, that the Covenant did only extend to the demised Premises, and the like is said to have been adjudged, 10 Eliz. upon a Demise of Land between Lands named for Abuttals; the Word (Premises) in the like Covenants, shall not reach to the Abuttals; yet the Word Premissa in his full and large Sense is as much as Prementionata or Prenominata, as Montague in Dive's Case, Plow. But a Wise Man in his Exposition must remember the Rule oculus ad metam, he must keep his Eye upon the the Mark; which is, that the Covenant which is but a Shadow, must be guided by the Body, which is the Estate. And therefore in the same Case of Lifford is cited a Case, judged between the Earl of Pembroke and Simonds, which was, that the E. of Pembroke granted to Sir Henry Bartly the Custody of Stafford-walk, and Brookham-Walk, in the Forest of Froom-Selwood for his Life; and then by another Deed confirmed his Estate in Brookham-walk; and by the same Deed granted Stafford-walk, in the Forest of Froom-Selwood, to him and his Heirs Male of his Body, and then added a Proviso, or Condition, that if he cut any Trees in the Premises, that then his Estate should cease, and then Bartly cuts Trees in Brookham-walk. And it was resolved, that the Word (Premises) should extend unto that, because the Deed had Operation upon it by way of Confirmation; but it should not extend to the other Parts of the Forest of Froom-Selwood though it were named, because the Deed wrought not upon them; which Case is full to the Purpose, a Condition being a Thing attending and applying it self to the Estate, as the Covenant doth.

1 Cr. 216.

11 Co. 50. a. 3 Cr. 782.

And upon the same Reason in Lofeild's Case, Co. lib. 10. 106. where one made a Lease of a Cellar for a Year, and if in the End of the Year the Parties should agree that the Demise should continue, then to have and to hold the same for three Years, reddendo inde annuatim durante dicto termino 40 s. And it was adjudged, that the Reservation did extend to the first Year, though he held no longer; for the Reservation is attendant upon the Lease, and the Word dicto Termino is indifferent to both Terms: So there is an Extension for Warranty, the Case 6 E. 2. Titles of Vouchers, 258. A. gives Land

Land to J. S. and his Heirs, & ego & hæredes mei warrantizabimus, not saying what, to whom, nor of what Estate, yet all supplied out of the Grant. For the Law imitates Nature, that gives Proportion to every Member answerable to the Body, that nothing be monstrous or deformed.

So then we proceed upon this Ground, that a third Part, and no more, is granted away, during the Demandant's Life; whereof it follows, that for the same third Part, the Demandants must be barred for want of right appearing to the Court, though the Issue for that third Part be found for the Demandant against the Tenant. That the Use of the third Part was to the Earl of Rutland and his Heirs, during the Life of the Lady Frances only. Ant. 199.

This general Position is not much denied by the Demandant's Counsel, but they avoid it thus.

They say, that when after, 7 Jacob. the Lady Elizabeth being Tenant in Tail in Possession, and the Earl of Rutland her Husband being Tenant for Life in Reversion, joined in the Fine to Gofton and Scriven in Fee, that this did work a Discontinuance by the Fine of Tenant in Tail, and so the Estate for Life did drown and extinguish it self in the Fee-simple granted to Gofton, &c.

So that when the Intail determined, the Demandant's Reversion was to come in Being, the Estate for Life being before extinct in the Estate given by that Fine, 7 Jac. which is by this Formedon in the Reverter to be defeated, if the Estate for Life be extinct; I mean so that it shall not run to the Benefit of the Conusees to whom it is given, but to the old Remainder or Reversion.

To this I Answer.

First, that the Estate for Life is not by that Fine 7 Jac. drowned and extinct; but that the Estate in Tail, and for Life, are both conveyed lawfully, as Estates in Being to these Conusees: So 3 Cr. 285.

First, the Estate for Life is not forfeited by this Fine.

Secondly, it is not involved in the Estate given by the Tenant in Tail, but it is given distinctly, as an Estate by it self in Judgment and by the force of Law. If the Estate for Life were extinct, or involved in the Estate given by the Fine 7 Jac. it must be either by Surrender, Forfeiture, or Confirmation. By Surrender it cannot Work. Note, that this could not Work by way of Surrender, as in Bredon's Case it might, because it is a Remainder following, and yet it was not taken as a Surrender, for then it had been against the Judgment.

And here first I do exceedingly commend the Judges that are curious and almost subtil, Astuti (which is the Word used in the Proverbs of Solomon in a good Sense, when it is to a good End) to invent Reasons and Means to make Acts, according to the just Intent of the Parties, and to avoid Wrong and Injury, which by rigid Rules might be wrought out of the Act. And that is well performed in Bredon's Case, Co. lib. 1. fol. 76. 2 And. 66. where a Tenant for Life, and he in Remainder in Tail, join in a Fine (Comeceo) the Tenant in Tail dies without Issue, the Conusee shall hold the Land, during the Life of the Tenant for Life. Note, in Bredon's Case, a strange Effect, for the Conusee, that had a Fee made of both Estates, as soon as Tenant in Tail died without Issue, had but an Estate for Life; for there 10 Co. 96. was no Discontinuance nor Change of the Reversion, but a lawful Giving of their Estates, and no more; so in English's Case there. 1 Leo. 115. 3 Cro. 115.

There is no Forfeiture in this Case, because the Tenant for Life gives not the Fee alone, but gives only so much of the Fee as he hath, and joins with another in giving a Fee, that hath Power to give a Fee during his Estate, without Wrong to any, and therein differs from M. 16 & 17 Eliz. Dyer, 1 Ro. 855. 339. of Tenant for Life, Remainder for Life, joining in a Feoffment in Fee, 1 Ro. 857. and from 41 E. 3. 21. of Tenant for Life, making Feoffment in Fee to him in the Remainder in Tail and his Wife. And if we need (as in Bredon's Case 1 Co. 76. a. to avoid Discontinuance, it was devised) that the Remainder in Tail should be taken to pass first, so here to avoid Forfeiture, the Remainder for Life may be said to pass first.

It is also no Discontinuance, because either of them gives their Estate lawfully, and there is no Necessity to conceive a Wrong to the Reversion, since

since a Fee may be determinable by Operation in Law, as in Bredon's Case, tho' it should, by the Fine, have been a perfect Fee, if there had been such an one to give. And Coke in that Case collects, that by reason of that Case, if Tenant for Life, and he in Remainder in Tail, make a Feoffment by Deed, that this shall be no Discontinuance, nor shall divest the Reversion, or Remainder depending, because it shall amount but to a Grant of both their Estates, and it so shall be a Fee determinable upon both their Estates, and no absolute Fee from the one, nor both, whatsoever the Word Imports, the one Construction working by Right, the other by Wrong, which the Law will not admit if the other may by any Means stand. So since these Estates might have been several without Forfeiture, the Law shall marshall them joining accordingly. So that this way, though the Tenant in Tail in Possession should make a Discontinuance, and so work a Wrong, yet the Grant of Tenant for Life in Remainder might be lawful.

1 Co. 76. b.

Syd. 83.

Note, my Opinion upon English's Case hereafter. These Things standing thus, it must follow, that the Estate for Life doth not pass drowned in the Tail, as giving Place to it. But it is true, that both the Estates, that were in them several, did pass from both, as distinct Authors of the new Estate, according to their Measures.

But now in the Conusee they are but one entire State made of two, and therefore remove the Confusion, as Chymists do, by extracting and segregating the Simples of a Compound; as suppose this Conveyance were upon Condition, the Entry shall restore their Estates as they were before: So in English's Case, in Bredon's Case, the Conusee took two Estates, and from two Givers, Tenant for Life, and an Infant in Remainder by Fine. The Conusee now had but one Estate, yet upon Reversal of the Fine, the Law restoreth no more to the Infant, but the Remainder, because he gave no more, yet the Estate for Life was as in this Case given, confounded in the Fee, and no Forfeiture made in English's Case. So in this Case I hold it clear, that if an Infant Tenant in Tail in Possession, and he in Remainder for Life had joined in a Fine, and the Infant had reversed his Fine, yet the Remainder for Life should have vested with the Conusee.

1 Co. 76. b.

Then again, admit it should be taken as a Discontinuance of the Tenant in Tail, and a Confirmation (which is the least) of the Tenant in Life for Reversion, who had that Estate by the Grant of the Donee himself, what Colour is there then that the Donor should recover the Land, as long as that Estate is out, that himself gave? no more than if the Tenant in Reversion had not joined, but kept his Right, or released it to the Discontinuee. And therefore put the Case, that A. Donee in Tail, Remainder to B. for Life, Reversion to C. in Fee, A. Discontinue at the Common Law, this is a Present Wrong to the Issue in Tail, and to B. and C. but such as none can Remedy, but in their several Times, so that if the Issue of A. sue not, B. cannot, if B. sue not, C. Cannot by the same Reason; if B. will release to the Discontinuee, or Confirm his Estate, it is all one to C. for his Estate or Right is not thereby anticipated, for there was nothing taken from him but his Reversion, which is all that he can require.

But if in Bredon's Case, the Tenant for Life had surrendred his Estate to the Tenant in Tail in the first Remainder, who had levied the Fine and died without Issue, he in the second Remainder might have presently had his Formedon, though the Tenant for Life were alive; for the Estate for Life was so drowned, as there was no more but the Estate in Tail, with the other Remainder following. So the Difference is, where the Tenant for Life in Bredon's Case surrenders, or in the Case releases to the Tenant in Tail before the Alienation, so that he hath all and gives all, one Giver, and one Estate only. And where there is a Joining in the Conveyance, or a Releasing or Confirmation to his Conusee, in which Case it is clear, that he gave but his own single Estate, and the other remains to be given by the proper Owner.

But that that troubles the Judgment in this Case, I suppose to be the Book of 9 Hen. 7. 25. and the Opinion Co. l. 6. 70. Sir Moyle Finche's Case, that

that if Donee in Tail be disseised, and the Donor disseise the Disseisor, and make a Feoffment over, and then the Donee re-enter upon the Feoffee, he shall have but his first Estate Tail, and the Reversion shall be turned to the first Disseisor, and shall not remain with the Feoffee of the Donor; whereof the Reason is, that where the Stranger disseiseth the Donee, he gained by Wrong both the Tail and the Reversion, and then had in him one entire Estate in Fee: Now when the Donor disseiseth him, he gains the Estate which the Disseisor had, which was intire, and so his Disseisin cannot divide the Estate as they were; for his whole Estate is by the Wrong in the first Disseisor, none having Right of Entry but the Donee, then when he makes his Feoffment over, that gives no Estate, but that wrongful one. But it gives away his Right also, not by granting, but by drowning and dying in the Land. So then when the Donee re-enters, he can have no more than his own, and must by his Entry restore the Reversion: The Feoffee cannot hold the Reversion, because the Estate he had was no other than that was wrongfully gotten by the Donor, from the first Disseisor, and given to him, wherein there was in Effect the Tail of the Donee, and the Reversion of the Disseisor: And now when the Donee re-enters, he cannot restore the Reversion to the Feoffee, in respect of the Right, because it is utterly annihilated by the Feoffment, which cannot give, but doth distinguish it. 33 H. 6. 5. b. Warrantia Chartæ, 11.

And now you must see no other Right; but that which grows out of the Disseisors, whereof the first is both the best in Estate and Right, and therefore if the first Disseisor had entered upon the Feoffee of the Donor Disseisor, and then the Donee had entered upon him, no Doubt the Reversion had been left in the first Disseisor, and then the Feoffee had no way by his buried Right to recover now, or after the Death of the Donee without Issue; so here Difference appears, that in this Case the first Disseisor hath Right to the whole Estate, wherein the Right is buried, and so redounds to his whole Benefit: In the Principal not so; for the Lady Frances had Right only to the Reversion in Fee after both the Estates ended, whereof the one helps the other.

So note, that the Right doth extinguish, whether it be by Feoffment, Release or Confirmation, to the Benefit of the Estates then last in Being, as of the first Disseisor. Much more here of the Discontinue being now in esse, not to the Benefit of the ancient Right, for one Right cannot extinguish another.

That though the Demandant is to be barred of the third Part only, yet it is Cause to abate the Writ, being a wilful Deserting, or Departure, from his Writ and Demand. 3 Point. Ant. 164. 11 Co. 5. b. 45. b.

Now then admitting that for the third Part, the Demandants are to be barred upon their own Confession direct, according to my Opinion, which must be peremptory, and final for so much, though there might have been a good Action for the whole, if they had tarried their Time, 'till after her Death; I hold, that the Demandant can recover nothing in this Suit, but the whole Writ is to be abated; for the Writ is falsified of their own shewing, and that in a substantial Part, and not in point of Form; for it appears, that they have no Right of Action at all for this third Part. As if a Man should demand a Debt of Twenty Pounds, and confess that he hath no Right to Ten Pounds of it, or demand a Hundred Acres, and confess that he hath no Right to Fifty of them, no doubt the Court Ex officio, or the Party either by Plea in Abatement, or as Amicus curiæ, at least might take Knowledge and abate the Writ. 3 Cr. 343. 2 Cro. 499.

But if they went on to Issue, and a Verdict given, where the Statute gives Relief, it doth as well when it appears of the Parties shewing as otherwise, 14 E. 3. F. Bre. 272. Formedon in Descender, the Gift was traversed to all, after the Demandant said they were agreed. The Tenant to confess the Gift for Part, and the Demandant to confess no Gift for the rest; the Court held, that by this the Writ should abate; wherefore the Judgment was first given against the Tenant for the third Part, and against the Demandant for the rest. 1 Saund. 285.

Et 9 H. 6. 54. One brought a Detinue for two Writings, and for one made no Title; Babington was of Opinion, that though this be a Bar for that, yet 11 Co. 45. b.

yet it may be pleaded in Abatement for all, as being more to his Advantage. But if it were only some Writings, then it must be in Bar as the Worthier. But then if it were found by Verdict it were otherwise. So there likewise, when a Formedon is brought of Land and Advowson; which is also one general Point of Godfrey's Case, Co. lib. 11. 45.

1 Saund. 285.

4 Point.

The Alterations made of the Reversion since the Gift in Tail by the Fine, 3 Jac. are true, one by the Gift of the third Part to the Earl of Rutland, during the Life of the Lady Frances, whereof we have spoken.

The other, the Conveyance of the Reversion in Fee-simple, as well of that third Part after the Earl of Rutland's Estate ended, as of the other two Parts, both which are to the Use of the Lady Frances and her Heirs, as it was before.

To the second I do agree, that if there be an Alteration of the Reversion, whereby it is made another Reversion than it was before, that it must be mentioned in the Writ; so is Wiseman's Case, where the Reversion that was in Fee, was turned into an Estate in Tail, though in the same Person.

2 Co. 15. a.

And Fitzh. Nat. Br. 219. F. Register 242. where an Estate for Term of Life was interposed, though ended, yet there is a Writ mentioning that Estate determined.

But here the Reversion for the two Parts, is the very same in Law in the Donor, that it was at the first, though it be in her now by a second Means, that is, by this second Fine to the old Use. Wherein observe Bo-kenham's Case, 28 Hen. 8. Dyer 7. fol. b. which Was, that Bo-kenham being Cestuy que use before the Statute of Land holden by Knights-service, Jay and other being his Feoffees, did infeoff Jenor and others to the Use of Bo-kenham and his Wife, and after their Decease to the Use of Bo-kenham and his Heirs: Bo-kenham died, and this was adjudged to be a Reversion and the old State. And in this Case, Willowby cites a Judgment of the Lord Rosse's, which came to this: That a Man being (as Baldwin puts it) Cestuy que use of two Acres, one by Priority, and the other by Posteriority, made a Feoffment together of both, yet the Priority remained.

1 And 2, 3. Co. L. 22. b. 2 Co. 91. b.

Ant. 27. Co. L. 23. a. Dy. 11. 2 Ro. 37. 1 Co. 102. b. 13. 56.

Now, though when the Lady Frances with the Earl of Essex levied the Fine, she had no Use, as in the other Cases, but Land in Possession, yet she raised both the Estate in Tail, and her own Reversion by Uses. And though Lands and Uses cannot now stand divided, as they did before the Statute, yet the Owner of the Land hath Power to give the Use, as he did before, and the Statute couples the Lands unto it, as it did when it found Land in Use at the making of the Statute. And as upon the Fine of 33. there was first an Use which was judged in Reversion, and then the Land followed in the same Degree; so the second Fine, by the Help of the Common Law, revives the same Use, being of the same Reversion, and the Statute makes it in the same Degree, and the rather, because there is no express Use in either, but the Use made by Law.

But that it was a Fault, take the Case of the Register, & Na, Br. stronger, considering that there the Fee of Reversion was never stirred, here it is, so that you must plead upon this Statute, that by force of that Conveyance and Statute you are seised, not by force of the first Conveyance. And so it may serve if you had granted the Reversion upon Condition and Re-entry.

It may be objected, that the Tenant or Vouchee in this Case, could not plead this Matter in Abatement for two Causes. First, because they had pleaded a Plea in Abatement of the Writ before, which was judged good against them; and the Court awarded, that they should answer to the Action of that Writ.

Secondly, because they had pleaded in Bar, and therefore could not resort back to a Plea in Abatement, and both are true.

But I answer, that there is no Plea in Abatement whereof the Party needs speak, as of Pleas in Abatement arising dehors the Record, and whereof the Court can take no knowledge.

But in this Case, where the Cause appears to the Court, either of the Parties own shewing, as here by Variance from the Register in the very Case appearing, or by false Latin, or the like, in such the Court may, and ought,

ought, ex officio, to abate the Writ at any Time. And if the Tenant or Vouchee shall inform the Court of it, he is in that but Amicus Curiæ, and this Information is not formal in pleading, nor in Court, but verbal, and may be done any where, and by any Body. As in the Case of 4 H. 6. 16. in a Formedon brought by the Duke of York against the Earl of Warwick; at the Summons returned, the Tenants were demanded and essoined, and the Essoiner pleaded in the Abatement, that the Writ was Dux Hiberniæ, where it ought to be Dominus. And it was said per Cur. that the Essoinee can plead nothing, but he may only demand the Demandant to make him Nonsuit; therefore he shewed this as Amicus Curiæ. For it was agreed, that the Court ex officio, ought to abate when the Fault is apparent. *Dux* for *Dominus*.

And therefore I condemn the Case 40 Edward 3. 35. When a Formedon in Descender was brought of Twenty Acres, which with other Twenty Acres, J. S. gave B. and the Demandant held him in simul cum D. after View the Tenant pleaded this Abatement, and it was denied him as an Exception, not rising from View, which was true as of his Plea, but it was the Office of the Court, Fi. N. Br. 26. It must be of Parts undivided, and before Partition the Insimul; so then it remained a Fault, whereof (when it appears to the Court of the Plaintiff's shewing) Advantage might be taken to abate to the Writ in such Manner as aforesaid.

Now the only Question is, whether the Advantage being permitted, after it might have been taken, and the Parties descending to an Issue, and Verdict found by Twelve Men, whether the Fault in the Writ be remedied by the Statute of Jeoffails 18 Eliz. c. 13. and (I) hold plainly it is: And because this Statute and the like, are of soveraign Use to cure those petty Maladies that arise of these curious Forms of Law, I will inlarge my self upon it, and I profess, that I may inlarge the Extent upon these Stat. so favourably, as I remove no substantial Point or Landmark between Right and Wrong; and therefore I do not very well like the Opinion of M. 1 H. & 2 P. & M. cited in Sir John Heydon's Co. l. 11. 6. that a Verdict between a Demandant and a Vouchee, shall be out of the Remedy of the Statute of 32 H. 8. the Words being (when the Issue is tried for the Party Plaintiff) surely he is a Party both to the Suit and Issue; and the Common Law (which is the Mother and Patron of Reason to a Statute) allows him a Party to take a Release from the Demandant, as well as the very Tenant; but he is no Party to the Original Writ. It is true, that Originally he is not, but by Substitution of the Party allowed by Law; and he may plead in Abatement, though he may also extort the Warranty of the Tenant having not taken Pleas in Abatement; so Delatories the Party must rather take, than put the third Party to his Warranty, which was intended always ult. refugium. But who requires this Strictness? It is not said Party to the Original, and the Statute says Plaintiff or Demandant generally, not saying against the Party Tenant or Defendant. And then, why may not by good Reason, the two Clauses for the Tenant or Defendant be inlarged to answer the reciprocal Intent of the one Number, rather than to restrain the Former by the Latter, especially since it is clearly true, the Issue found for the Vouchee, is found in Effect for the Tenant, and the Demandant thereby clearly debarred?

5 Point.

Hobart. A Fault in a Writ remedied by Statute of Jeoffails of 8 Eliz.

And. 1. 26, 60. 5 Co. 36. b. 11 Co. 6. b. Utra. 32 H. 8. cap. 30. O. Benl. 12. N. Benl. 37. Benl. M. Kel. 207. b. Benl. M. Ash, Pl. 5.

But the other Clause found for the Demandant clearly, is within both Words and Meaning; for it is for the Demandant, and he hath Judgment upon it against the Tenant, and the Tenant over against the Vouchee.

And that is our Case, that the Verdict here found is for the Demandant for two Parts indeed, and for the other Part also; arguing this Point as I do, though for the third Part it self it be a Bar, yet it makes but Form, as to the abating of the whole Writ for the rest.

And though the Statute is want of an Original Writ, not want of an Original generally: Yet in a Case between Wells and Woodhouse, where Wells brought a Trover in the King's Bench against Woodhouse, and after Verdict assigned for Error the want of a Bill: It was resolved in the Exchequer-Chamber, that the want of a Bill in the King's Bench was no Error; for a Bill was in lieu of an Original, and therefore was within the Remedy of 18 Eliz. And so it hath been oft adjudged in the Common Pleas, that the

Plo. 38. 1 Cr. 282. Jones, 304. 2 Cr. 109, 186, 580.

Ant. 130, 134, 264.

Want of a Bill for or against an Attorney is holpen by the same Statute. But this Case of ours is not subject to that Doubt of 1 & 2 P. & M. though the Issues were between the Demandant and Vouchees. For it is not within 32 H 8. but within 18 Eliz. being a Fault supposed in the Writ, and that Statute being in general Words (if any Verdict shall be given in any Action, &c.) without Mention between what Parties as 32 did. So now the only Question is, whether this Fault in the Writ (supposing it a Fault) be within the Remedy of 18 Elizab. c. 13. whereof the Words are, if any Verdict of Twelve Men or more shall be hereafter given in any Action, Suit, Bill, Plaint or Demand in any Court of Record, the Judgment shall not be staied or reversed by reason of any Default, or lack of Form touching false Latin, or Variance from the Register, or other Defaults in Form in any Writ Original or Judicial, whereupon first it is to be observed, that the Faults remedied by the Law must be Faults in Form, as Form stands in Opposition against the Matter in Law, and very Right, which Words are expressed in the Statute 27 Eliz. of Demurrers, which are of the same Nature, and are tacitly excluded also out of all this. And therefore the Point of Variance from the Register, must not be in Matter of Law and very Right; nay though you have very Right, you must not vary from the kind of Writ that is proper to your Right: But if you keep the kind or Species, you may vary in Form.

Dy. 125. a. Therefore if you take a Formedon in Descender, where your Right is by Remainder or Reverter, or e converso, it is not holpen. Nay, if you take Reverter for Remainder, though both arise from an Intail made and ended, and thereupon the Land falling either to the Donee or his Assignee, I hold it uncurable (yet in Grants these may serve one for another, as 18 E. 3. 28. Plow. 170. redibunt to a Stranger) for these kind of Variances are not Variances from the Register, but Variances from your Case and Title, for the Nature of a Recovery is like as in a Remitter to restore you to Land according to your Title.

22 E. 4. 22. Ant. 233. So if an Action of Debt be brought against an Executor in the Debet & Detinet, the Verdict helps not, for it differs in Nature and Judgment, the one charging the proper Goods of the Defendant, the other not.

Ant. 272. 3 Cr. 326. 5 Co. 31. b. 2 Cr. 545. Hutt. 79. 2 Cr. 545, 685. And yet in a stronger Case, Lancastel as Executor recovered against Sidley, who being in Execution in the King's Bench escaped, and then his Executor brought a new Action of Debt in the King's Bench, in the Debet and Detinet against Sir George Reynolds the Marshal, and had Judgment after Verdict, which was reversed before us in the Exchequer Chamber, and yet the Words of the Judgment were of the Part of the Plaintiff all one, but the Effect divers; for the Debet and Detinet is for his own Use, and the Detinet for the Testator's.

But there are Forms curable, as in a Formedon in Descender, the Demandant in his Writ must make mention of every Heir, to whom any Right is descended after Discontinuance, though they were never seised. Buckmer's Case, Co. l. 8 f 88. or else it may be pleaded in Abatement, and so is Fitz. Nat. Br. 220. D. & 18 E. 2. Formedon 59. for conveying the Line of the Donor in Formedon in Reverter; yet I hold both these Omissions cured by the Verdict, provided that they make themselves Heirs to the last that was seised by Force of the Tail, or to the first Donee, for that is material. See Fitzh. Nat Br. 218. D. & 219. E. if the Donor grant his Reversion in Fee, the Grantee shall have a Formedon in Reverter, but if he grant his Reversion in Tail, it shall be in Remainder; yet I hold, that a Verdict will help, although it be made Reverter upon the Intail; because it is true, that he hath Reversion in Tail, and hath Rent incident unto it. Scolastica's Case, Assize was Summoneas quod sint coram præfat. Justiciariis. The Writ was abated, but if it were at this Day, after Verdict, it would be good. And though in Bracebridge his Case, 14 Elizabeth, Plow. 424. he were of Opinion, that where an Ejectione Firmæ was brought of Land upon a special Verdict, the Court judged one half undivided for the Plaintiff, and the other half against him; Plow. was of Opinion, that the Writ ought to have abated; yet all common Experience at this Day is against it after Verdict. And this I hold for a Rule, that where the Statute of 18 Eliz. doth cure a Fault in Form after Verdict, it works that Effect as well where that Fault in Form

Form appears by the Confeſſion of the Party, as otherwiſe; for the Statute is General without Difference. So I hold it at the moſt to be but a Fault in Form, varying from the Regiſter, when the Writ demands the whole, and the Right is but an undivided Part.

(361) Adams *verſus* Flemming. Caſe.

Hill. 16 Jac. Rot. 890.

ADams brought an Action upon the Caſe againſt Flemming for ſpeaking of theſe Words, viz. he hath forſworn himſelf before the Council of the Marches, meaning his Majeſty's Council in the Marches of Wales, in the Suit I had againſt him there, and I will ſue him for Perjury there; and after a Verdict for the Plaintiff, upon not Guilty pleaded, it was moved by Maſter Serjeant Chibborne in Arreſt of Judgment for the Inſufficiency of the Words, becauſe this Court cannot take Notice of the Council, &c. And yet Judgment was given with the Plaintiff, for Ten Pounds Damages and Coſts.

He hath ſo ſworn himſelf before the Council of the Marches of *Wales*. Hutt. 34. Meſme Ca. Brownl. 1. R. 13. Hardres, 151. Ro. 1. Ab. 40. 2 Ro. R. 40. 2 Cro. 190. 204, 436. Mo. 404. 1 Cro. 378. Judgment. 3 Cro. 135, 185.

(362) Hannor *verſus* Maſe. *Audita Quer.*

HAnnor brought an Audita Querela againſt Maſe, upon a Judgment for Debt and Coſts, and ſhews, that he had a Releaſe after the Judgment. The Defendant pleaded, that after the Judgment, and after the Releaſe ſuppoſed to be made, he ſued forth a Scir. fac. upon the ſame Judgment, and that upon this Writ he had Judgment to have Execution by the Default. And it was moved by Serjeant Harris, and a Caſe was cited by him 12 Hen. 7. in Juſtice Cook's Reports, fol. 11. that if the Demandant, after Judgment, have a Releaſe made unto him by the Plaintiff, and after the Plaintiff ſues a Scir. fac. upon the ſame Judgment, and the Defendant being garniſhed makes Default, and Execution is awarded, he ſhall never have an Audita Querela. Otherwiſe it is; if a Nihil be returned upon the Scir. fac.

1 Roll 306. 1 Cr. 4. N. B. 104. 1 Co. L. 290. b. 8 Co. 152. a. Yel. 6. Godb. 155.

In what Caſe an *Audita Querela* ſhall not be had.

3 Cro. 4. 25. 2 Cr. 507.

(363) Caſtilion *verſus* Executor of Smith. Obligation.

Tr. 17 Jac. Rot. 1849.

CAſtilion brought an Action of Debt againſt the Executor of Smith, upon an Obligation made by the Teſtator, with Condition for Performance of Covenants in an Indenture, in which there was a Breach aſſigned for Plowing of Marſh Lands, by the Executor himſelf after the Death of the Teſtator. And it was moved by Serjeant Henden after Judgment, to have Execution of the Executor's own proper Goods, for that the Breach of the Bond was by the Act of the Executor himſelf. And the Court was againſt him, and Judgment was entred De bonis Teſtatoris. 1 Saund. 112. Ant. 188. Dy. 324. b. 2 Cr. 191, 646, 647, 648, 672.

Judgment *De bonis teſtatoris*. Hutt. 35. Meſme Ca. Ant. 188. Brownl. 1. R. 24. Mo. 70. 1 Ro. 931. 2 Cro. 672, 932. 5 Co. 31. a. Yel. 103.

(364) Edwards *verſus* Engleton. Treſpaſs.

Tr. 17 Jac. Rot. 944.

EDwards brought an Action of Treſpaſs againſt Engleton, for that with Force and Arms he took and led away Quendam canem venaticum prec. &c. And after Verdict for the Plaintiff, Judgment was given for the Plaintiff by the Court.

Canis Venaticus. 1 Roll. 5. Cr. Jac. 463. Br. Property 44. Br. Treſp. 407. 3 Cro. 125, 126. 7 Co. 46. Judgment. Hale's Pl. Coron. 54. 1 Saund. 84.

Battery.

(365) Hunt *verſus* Lawring.

Tr. 17 Jac. Rot. 944.

Teſt. of the Original. 2 Cr. 622. Ant. 76, 130, 246.

HUnt brought an Action of Aſſault and Battery againſt Lawring for beating of his Servant, by reaſon whereof he loſt his Service, &c. for a long Time; and declares, that the Battery was done on the 19 of January, in the 16 Year of his Majeſty's Reign that now is, and that he loſt his Service for a long Time, viz. for the Space of ſix Months then next following; and after a Verdict for the Plaintiff, and entire Damage aſſeſſed, it was moved by Serjeant Aſhley, that the Original did bear Teſt before the End of ſix Months. And yet the Court gave Judgment for the Plaintiff, notwithſtanding this Exception, for that the videlicet is more than needs.

Judgment.

Treſpaſs.

(366) Green *verſus* Harrington.

Tr. 17 Jac. Rot. 923.

Styl. 45. Cr. Jac. 96, 154, 428. Yel. 182. Leo. 1. R. t. 293. Allen, 29. Yel. 84. 1 Roll. 8. 1 Cr. 343, 415. Meſme Ca. Hutt. 34. Jones, 329, 364. 1 Brnl. 14. Cr. Jac. 598, 668. Hutt. 22 23. Null aſs' Gift. Styl. 53, 463. *Aſſumpſit* upon Promiſe.

PEter Green brought an Action of Treſpaſs upon the Caſe, againſt Thomas Harrington, that whereas the Defendant 26 of Octob. in the 16 Year of his Majeſty's Reign, was indebted unto the Plaintiff in Ten Pounds for Rent in Arrear, and unpaid to the Plaintiff for one Year, ended at the Feaſt of Saint Michael the Archangel, then laſt paſt, for certain Lands in Harrington demiſed unto the aforeſaid Defendant by the ſaid Complainant; the ſaid Defendant, in Conſideration thereof, did aſſume to pay the ſaid Ten Pounds, whenſoever he ſhould be thereunto required, &c. The Defendant pleaded, that he made no ſuch Promiſe. And after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this was no ſufficient Conſideration, but that he had good Remedy by Action of Debt for his Rent, and he could not have two Remedies. And the Court will be adviſed.

1 Leo. 293. 1 Cro. 343, adjudge accord.

Treſpaſs.

(367) Steward & Uxor *verſus* Sudbury.

Tr. 16 Jac. Rot. 1655.

Declaration excepted againſt.

SImon Steward Eſquire, and Dorothy his Wife, brought an Action of Treſpaſs againſt Humphrey Sudbury, for that with Force and Arms he brake the Cloſe of the ſaid Dorothy, when ſhe was ſole, and cut and carried away the Thorns, and Under-woods of the ſaid Dorothy, &c. and declared upon the cutting of two Acres of Under-wood and Thorns; after not Guilty, the Plaintiffs were Nonſuit at the Aſſizes, and the Plaintiffs moved, that the Declaration was not Sufficient, becauſe Acres of Under-wood, &c. was not good, and ſo prayed that the Defendant might not have Coſts. But the Court gave Judgment againſt them for the Defendant, that he ſhould recover Coſts.

Judgment. Ant. 219. 2 Cro. 159. 2 Cr. 59. Hutt. 16. 2 Ro. R. 48. 213.

2 Deliverance.

(368) Gayhard *verſus* Miller.

Tr. 16 Jac. Rot. 3124.

Ven. fac. where to the Manor, where to the Town. Treſpaſs. Ro. 2d. Ab. 619, 620, 621. Poſt. 305, 326. Co. L. 125. b. 6 Co. 14. a. Yel. 26, 77. 182, 2 Cr. 8. Yel. 187.

IN a ſecond Deliverance, for taking away of his Horſe at Wikefitz-pain, in quodam loco vocato Ore Places. The Defendant ſays, that the Place where contains Twenty Acres, Parcel of one Thouſand Acres, &c. which one Thouſand Acres are, and Time out of Mind were, Parcel of the Manor of Wikefitz-pain in the County aforeſaid; of which Manor, Henry Earl of Northumberland was ſeiſed in Fee, and acknowledgeth the Taking as Bailiff to the ſaid Earl. The Plaintiff traverſeth abſque hoc quod locus in quo, &c. fuit parcella

parcella Manerii de Wikefitz-pain, the Ven fac. was awarded de vicineto de Wikefitz-pain, &c. And after Trial and Verdict here at the Bar, Judgment was ſtayed, Pro defectu de Ven. fac. becauſe the Ven fac. ought to have been De vicineto Manerii, &c. and not De vicineto of the Town. 2 Cr. 302, 405. 3 Cr. 304.

2 Cro. 8. Yel. 26, 82. 1 Cro. 480. Meſme' dit q' c' voie p' Stat. 21 J[illegible] cap. 13. 6 Co. 14. a. 1 Cr. 480.

(369) Mannors *verſus* Biſhop of Lincoln *and* Naylor. *Quare Imped.*

Paſc. 17 Jac. Rot. 460.

" IN a Quare Impedit, brought by Mannors, Plaintiff, againſt the Biſhop " of Lincoln and Naylor. The Plaintiff declared, that one Terwhit was " ſeiſed of the Manor ad quod, &c. in Fee, and demiſed the ſame to the " Plaintiff for Years, and that the Church became Void, and that Terwhit " the Leſſor preſented by Uſurpation one, that was admitted and inſtituted, " and that after the ſaid Mannors being poſſeſſed of the ſaid Manor, ad quod, " &c. the Church became Void, by Reaſon whereof it appertained to him " to preſent, &c. Whether this were a good Title in a Quare Imped. is the " Queſtion in Demurrer.

Co. L. 249. a. Poſt. 322.

(370) Balder *verſus* Blackborne. Debt.

Trin. 17 Jac. Rot. 465.

" BAlder brought an Action of Debt againſt Blackborne for Twelve Pounds, " and declared upon a Demiſe made by the Plaintiff to the Defendant " of one Meſſuage, &c. the 14 Day of May, Anno 15 habendum uſque Feſtum " ſancti Michael, next following, and ſo from Year to Year, &c. yielding " Twenty four Pounds Rent per annum, &c.

Caſe of Debt. Hutton 36. Meſme Ca. 1 Brnl. 79. Demiſe Br. 39.

" Upon Nil debet per patriam pleaded, the Jury found a ſpecial Verdict, " that one John Wells was ſeiſed of the ſaid Meſſuage, &c in Fee, and held " the ſame in Soccage, and by his laſt Will in Writing, deviſed the ſame " Land, &c. to Anne his Daughter, and to her Heirs for ever, at the full " Age of 18 Years; and further deviſed, that my Wife and Executor ſhall " have the Education of my Daughter with her Portion of Money, and " Profits of my Land to her own Uſe, without Accompt, until my Daugh- " ter's Age aforeſaid; provided that the ſaid Executrix ſhall pay the Quit- " rents and Fines, &c. and keep and bring up my Daughter at School, " &c. and made Alice his Wife his Executrix, and died. Alice proved the " Will, and took upon her the Charge and Execution thereof, and married " with one Richard Porie, and after died; and that the ſaid Porie aſſigned o- " ver his Intereſt to the Plaintiff, who demiſed it unto the Defendant " prout in the Declaration. And that the ſaid Anne is living, and under " the Age of Eighteen Years, viz. of the Age of Fourteen Years, and that " the ſaid Executrix had performed the Will of the Teſtator.

Vaugh. 145. Dy. 551. 2 Leo. 221. 3 Leo. 9. 78. 3 Leo. 65. Dy. 26. b. Yel. 73.

And without much Difficulty or Doubt, the Court, upon View and rea- ding the Verdict, gave Judgment for the Plaintiff. For it is a plain Term given to the Wife to her own Uſe, which accrues to the Husband, and the keeping and Education of the Child is not of ſuch particular Privity, but it may be performed effectually by another.

Judgment. 3 Cr. 39, 252.

Roberts

Replevin.

(371) Roberts *verſus* Young.

Tr. 16 Jac. Rot. 1700.

1 Brnl. 172.

" ROberts againſt Young in a Replevin, for taking away his Cattle at " Aller, in a Place called Land-Mead. The Defendant doth acknow- " ledge the Taking, as Bailiff to Sir John Davis Knight, the King's Ser- " jeant at Law, in a Place containing four Acres, as in his Free-hold Da- " mage-Feasant. In Bar of this Cognisance, the Plaintiff pleads, that " Henry Earl of Huntington was seised of the Manor of Aller, whereof one " Messuage, &c. is Parcel and demisable by Copy, and that within the
2 Cro. 302. " said Manor there is this Custom, that every Customary Tenant of the " said Messuage, &c. have used to have Common of Pasture, &c. in the said " Place called Lands-Meadow, and so derives his Title by Grant by Copy. " The Issue is upon this Traverse, absque hoc quod infra Manerium talis habe-
Custom of a Manor cannot extend out a Manor. 4 Co. 31. b. 6 Co. 60. b. " tur consuetudo quod quilibet tenens customarius, &c. have used to have Com- " mon, &c. prout, &c. And after a Verdict for the Plaintiff, it was moved " by Serjeant Harris, that this was no Custom, for that it doth not appear " in the Pleading, that the Place in quo, &c. est infra Manerium, because " the Custom of the Manor cannot extend out of the Manor, but he ought to " prescribe in the Lordship of the Manor, &c. And the Court will be ad- vised.

Note, that the Dividing of a Common from the Manor cannot prejudice the Common; also there is nothing more common, than for the Lord to prescribe for his Tenants by Copy, in another Man's Land, whereas if it be in his own, it shall ever be laid by Custom.

Cur. Eccle.

(372) Napper's Caſe.

1 Cr. 237. Ant. 247. 5 Caſe.

NApper libelled in the Spiritual Court of Wells against divers Parishio- ners of Tintonholt, in the County of Somerset, for Tythes in Kind. The Defendants plead in the Spiritual Court a Custom, that they there have used to pay the tenth Part of the Rent reserved upon their Leases, &c. And the Judges of the Spiritual Court proceed to examine Witnesses to
Yel. 102. prove this Custom. The said Napper, for that a Custom is determinable at the Common Law, and not before a Spiritual Judge, moved for a Prohibi- tion to the Spiritual Court, that they should not proceed to try this Custom before them, and the Court gave Day 'till the next Term to shew Cause, &c.
Ant. 247. and in the Mean Time to stay the Proceedings to examine the said Custom.

Prohibition.

(373) Farmer's Caſe.

Sta. 31 H. 8. of Discharge of Payment of Tythe.

INter Farmer & A Prohibition was granted out of this Court in the Spiritual Court upon Discharge of the Payment of Tythes in the Hands of the Abbot, upon the Statute of 31 Hen. 8. and upon Issue joined, the Cause was tried at the Bar, by a Jury of the County of Nor- thampton, and after full Evidence given, the Plaintiff was Nonsuited, and a Writ of Consultation awarded, and after the Consultation the Plaintiff
Ant. 121 in this Court pleaded the same Plea, in Discharge of Payment of Tythes in the Court Christian, which was alledged in the Prohibition, which Plea the Spiritual Judge accepted, and proceeded to try the same there; and the Court was moved on the Part of the said Farmer the Parson, to have a Pro- hibition to the Spiritual Judge, that he should not admit of this Plea, which was once tried in this Court, and which meerly appertained to the Judges of the Common Law to determine, which was granted by the Court;
Post. 290. for the Trial at the Common Law, and the Consultation upon it is Final in this very Suit, and upon that Libel.

Whittingham

(374) Whittingham & Sarah Ux. *verſ.* Tertenants of the Earl of Derby.

" VIncent Norrington in Anno 35 Elizabeth, recovered in this Court, againſt the ſaid Earl, as well three Hundred Pounds Debt, as three Pounds Coſts, and made Joan Norrington his Executrix, who died before Execution Inteſtate. The ſaid Sarah took Adminiſtration of the Goods of the ſaid Vincent, by the ſaid Joan unadminiſtred, and took to Husband Whittingham the now Plaintiff, both which brought a Scir. fac. againſt the ſaid Tertenants upon the ſaid Judgment, and had divers Scir. fac. (upon Return in London quod nulli ſint Tenentes) into divers Counties by one Teſtatum, viz. into the Counties of Lancaſter, Cheſter, and Northampton, Ret. Cra. Animarum. Anno 16 Jac. Regis, upon the ſaid Writ into the County of Lancaſter, a Scir. feci is returned againſt O terre Tenants; Et quod non fuerunt plures, who made Default, and Judgment was given to have Execution againſt them. And Execution by Elegit was awarded againſt them. *Scir. fac.* Hutt. 37. Meſme Ca.

" Upon the ſaid Writ in the County of Cheſter, it was returned quod Scir. feci to Thirty Tertenants; Et quod non fuerunt plures Tenentes, Ten of theſe Thirty made Default, and Judgment is paſſed againſt them, and an Elegit awarded againſt them: The other Twenty appeared and pleaded ſeverally, and upon ſeveral Replications Demurrers are joined, entered and continued, uſque oct Michael. hoc Termino; upon the third Scir. fac. the Sheriff of the County of Northampton returned a Scir. feci to the Earl of Bridgewater, and his Countes Tenants, &c. who appeared and pleaded, and and had Day to amend their Plea 'till this Term."

Before which Time, and before any Execution done upon theſe Writs of Elegit, the ſaid Whittingham the Husband died.

It was moved by M. Serjeant Hendon.

First, whether by the Death of the Husband, all the whole Writs of Scir. fac. ſhall not abate, as well againſt the Tenants, againſt whom the Judgment is entered, as againſt them that have pleaded. Mo. 29. Error, Br. 117

The other Queſtion, whether (admitting that all the Writs ſhall abate againſt all) the Plaintiff ſhall have Execution againſt any of theſe Tenants before the Judgment be given, for or againſt the other. And upon theſe Points the Court will be adviſed. *Cur. aviſ. vult.*

(375) Rugle's Caſe. Bankrupt.

IN a Caſe of one Rugle of Suffolk, a Bankrupt deceaſed, referred by the Court upon a Trial to Sir Robert Crone, upon View of the Statute of 13 Elizabeth & 1 Jac. it was reſolved by the Court, that if certain Creditor's ſue a Commiſſion, and others within four Months after, or more, being Creditors, come before Diſtribution, and will join in the Charge of the Commiſſion, and all that belongs to it, and tender their Parts, that they ſhall not be refuſed, but have their equal Parts as Creditors But if any Diſtribution be made of any Part of the Eſtate, no Creditors are to be admitted after, that came not in before. Hutt. 37. Meſme Ca. 2 Co. 26. b. Yel. 198. 2 Co. 25. a. Star. 12 Eliz. c. (7) & 1 Jac. c. ( ) of Bankrupt.

Searle

Hill. 17 Jac. Prohibition. Eſſex.

(376) Searle *verſus* Williams.

Tr. 16 Jac. Rot. 1782.

Ant. 121. 2 Cro. 430. 2 Roll. 222, 305. Charter de Pardon, Br. 21.

SAmuel Searle Parſon of Heydon German, brings a Prohibition againſt John Williams, and declares, reciting the Statute of 18 Eliz. of Clergy, where he was Parſon, &c. and was indited 13 Jac. at Lent Aſſiſes, before me and my Brother Haughton for Manſlaughter, for the Death of one Simonds, and convicted for the ſame, and that the next Aſſiſes in Summer he was allowed Clergy, but was not burnt in the Hand becauſe of his Orders, but by Judgment of the Court was inlarged, and delivered out of Priſon; by force of which Judgment he was purged and acquitted of the Felony: Yet the Defendant pretending him to remain ſtill convicted of the ſame Felony, and thereby deprived of his ſaid Benefice, and the Church to be Void (which was not ſo) and that Doctor Donne the Patron had preſented him to the ſame, drew him in Plea before the Chancellor of London, from whence it was appealed to the Judge of the Audience, and from thence before the Judges Delegate, where it hangs undiſcuſſed; whereupon he had his Prohibition, and yet the Defendant proſecuted after in the Court-Chriſtian; whereupon the Defendant demurs in Law, and Judgment was given upon open Argument by all the Judges for the Plaintiff, that he ought not to be queſtioned now in the Spiritual Court for this Man-ſlaughter, as the Caſe ſtands; whereof the Reaſon, and much of Clergy at large, will appear here.

Clergy for Manſlaughter.

Judgment.

The Benefit of Clergy is a Refuge provided by Common Law in Favour of Learning, to ſave the Life of an Offender Literate, in certain Caſes; though I will not deny, but that it took his Original by Occaſion of the Canon Law, and in Favour of the Church, and was ever ruled, not by any fixed Canon Law, but ordered and qualified by the King's Court according to Convenience.

At the Common Law at the firſt, the Benefit of Clergy was not allowed but to Clerks in Order, Secular and Religious, as appeareth by the Statute 25 E. 3. cap. 4. and 4 H. 4. cap. 2. neither did the Common Law require more, 20 E. 2. Coron. 233. Clergy refuſed, becauſe he had not Tonſure nor Habit, and therefore judged to Penance. And then if the Ordinary had challenged him, he ſhould have loſt his Temporality and his Franchiſe of Clergy. Yet the Common Law extended in the King's Courts to all that could read, as appears 4 H. 7. cap. 13. in Favour of Learning in general, and in Reverence of Mankind, and Man's Blood (which in Perſons of Ule was not to be ſhed ſlightly) and as they did extend it beyond the Canon Law, ſo did they ſtraiten it, and deny it in Caſes, and Perſons, and Times, where the Canon Law did grant it, as now, 'till Conviction paſt.

Poſt. 290.

The Time of claiming Clergy, could not be 'till after Indictment, and upon Arraignment to have a Judge to allow and deliver the Offender, as Weſtm. 1. cap. 2. ſpeaks, and ſo Bracton writ. But yet even then for the Credit of the ſolemn Inqueſt of Indictors (as the Words of the Law are) he was not to be delivered without due Purgation. Both which Points appear by the ſaid Statute of Weſtminſt. 1. 3 Ed. 1. cap. 2. yet ſee the Practice 8 E. 2. Coron. 417. that if a Clerk were indicted and prayed by the Ordinary: Yet they took an Inqueſt of Office; and if that found them Guilty, he was to be delivered to the Ordinary; but to forfeit his Goods, an Invention of Law to get the Goods; but as yet the Common Law allowed not the Clerk to be delivered to the Ordinary, after he was convicted by a Jury of Life and Death, but that obtained Allowance by the Statute 25 E. 3. cap. 4. pro Clero, which provideth, that though he be convicted of Felony (yea even for Treaſons, which touch not the King himſelf, or his Royal Majeſty) he ſhall be delivered to the Ordinary.

Hale's Pl. Cr. 239.

Hale's Pl. Cr. 230.

But yet Purgation in that Caſe, after Trial, was not allowed by the Statute, but an Ordinance promiſed by the Archbiſhop (and that in Retribution for that Grant) for their ſafe Keeping and Puniſhment, which was alſo

alſo again ratified by another Statute 4 H. 4. cap. 2. Raſt. 9. that Purgation in ſuch Caſes ſhould not be allowed; ſo it ſeemed, that they made their Ordinance to that Purpoſe, as was premiſed before, id eſt, that they ſhould not be admitted to their Purgation, but kept in Priſon and puniſhed.

So now you ſee that Clergy might be prayed, either before or after Conviction at the firſt: But now of late Times the Common Law runs another Courſe, to deny Clergy, until the Offender were Convicted, which it ſeems hath two Reſpects; the one to retain their Juriſdiction over the Clergy, which the Clergy laboured to diſannul, by Challenging the Priſoner at the firſt, as was ſaid. The other, to bring Forfeiture of Goods to the King, by the Means of the Common Law, that the Offence ſhould not utterly paſs unpuniſhed with us, and yet to ſave the Life of the Offender. For there are two Benefits of Clergy, the one the Saving of the Offender's Life, which is Favour meerly of the Common Law; for that allowеth him for a Clerk or not, and ſo delivereth him from the Severity of the Law. The other is the way of Purgation, which is no Ordinance of the Common Law, but is a Practice amongſt themſelves rather overſeen and winked at, than approved by the Common Law, after Condition, Standford, 1. 7. If Purgation failed, yet he was not rendred to the Law, but degraded and kept in Priſon 'till a Pardon. Now as the Statute of Weſtm. 1. before mentioned, that giveth way to due Purgation after Indictment, only ſaith, that if they abuſe that Liberty, the King will provide other Remedy therein. I ask how that Proviſion ſhall be: And I Anſwer, that it was to be done by the ordinary way of Juſtice, and Rule of Courts; for ſince they could not have the Priſoner but by Favour of the King and his Laws, nor could admit his Purgation to the Prejudice and Derogation of the Proceedings of the King's Courts; but as the King by his Statutes and Laws did permit the ſame, it was agreeable to Juſtice, that the King's Court ſhould deliver him, abſque Purgatione, after the Condition, becauſe by the true Meaning of the Laws he ought not to purge in that Caſe. Hale's Plea. Crown, 239.

And the Court may deliver a Perſon that is an infamous Chief, Abſque Purgatione: So their Diſcretion and Order is the Rule, 10 E. 3. F. Corone 247. Opinion of Spiganel.

But yet it is true, that if the Court did deliver them after Condition, without that Clauſe, they would and did purge them ordinarily after Conviction.

This I ſpeak the rather, becauſe it is commonly ſaid in Books, that a Clerk attainted cannot purge, and ſo in other Caſes, which muſt be underſtood, that in ſuch Caſes the Record in the King's Court is traditur ordinario abſque Purgatione: For that is all the Record the Ordinary hath to reſtrain his Purgation, for he hath no Record of Attainder, neither is he to take Knowledge of the Law of the Land, that an attainted Perſon is not to purge; and therefore where the Clauſe is not, he will purge, attainted or not.

And ſo on the other Side, if the Offender were delivered after Condition, and before the Attainder Abſque Purgatione, (as in foul and apparent Facts they were and might be, by Diſcretion of Courts) the Purgation was thereby reſtrained.

Three Things are to be obſerved in the giving and taking of Clergy at the Common Law. Hale's Pl. Cr. 239.

Firſt, that the Court is not to tender it ex officio: But the Clerk that is the Offender is to pray it, as being a Favour, and a remitting of the Rigour of the Law, yet 22 E. 3. F. Corone 254. ſays, that if the Judge know him to be a Clerk, they will not give Judgment, though he pray it not; this is Grace, as though it were a ſpecial Pardon not pleaded.

Secondly, that if the Offender pray it, it is not in the Choice of the Judge to deny or grant, but it muſt be allowed him, where by the Law it is allowable.

Thirdly, though many the Statutes, as Weſtm. 1. and Articuli Cleri. cap. 16. 25 Ed. 3. cap. 4. ſpeak of the Ordinaries demanding of the Clerk and his Privilege, yet a Clerk might pray his Privilege himſelf, and ſo is the

Statute 18 E. 3. cap. 2. Raſtal. 5. and the Ordinary could not defeat him of it, neither directly by refuſing him, nor indirectly, and by Practice, by anſwering the Court, that he reads not as a Clerk, when he did indeed in Judgment of the Court. And therefore the Book 21 E. 4. that ſays, that at Newgate one was ſo refuſed, was but the Opinion of one Judge, and reported of Hear-ſay, ut Audivi. But the Book 9 E. 4. 28. is reſolved better, that if the Ordinary refuſe him where he is capable, yet he ſhall not die. And e Converſo, if the Ordinary requires, and ſays he reads where he is not capable, yet he ſhall Die.

Finch. 65. utr.

Clergy, Br. 7.

So the Privilege may be granted whether the Ordinary will or no, and by Conſequence without him, ſo that if he will be wilfully Abſent, the Court may both Fine him, and proceed without him; for this is an Act that is done in the Preſence of the Judge, like the Caſes of Inſpection by the Judge himſelf, which are abſolute, and do over-rule any falſe Certificate, or Anſwer, which is not ſo where the Certificate is of Things done out of the Court, 22 E. 4. F. Corone. 44. Reſolution of all the Judges, that if an Ordinary refuſe a Clerk, yet they ſhall remand him to the Priſon, ſc. of the Court, and ſo e Converſo. Fitz. N. Br. 66. & 4 El. Dyer 215. & Reg. 69. If the Ordinary be abſent, the Court may give the Priſoner his Book, and enter his Reading, and remand him to the Goal, and then the Ordinary ſhall have the King's Writ to the Juſtices, commanding them to command the Goaler to deliver the Priſoner to the Ordinary, which is without any new Reading in the Preſence of the Ordinary, 26 Aſſ. 19. F. Corone 191. If the Ordinary Challenge one that is no Clerk, he ſhall loſe his Temporalities, and yet alſo, he ſhall loſe the Clerk; for elſe how ſhall he be adjudged no Clerk to induce the Forfeiture of the Temporalities of the Ordinary?

Ant. 288.

So regularly the Ordinary, even at the Common Law, had no Power over a Clergyman in a Crime or Offence touching the Crown, but where that Power was given him by the Common Law.

And therefore, when the King's Court did deliver the Offender to the Ordinary, it did imply a Power or Permiſſion of the Law, that he might deal with him, to convince or diſcharge him, according to the Form of their Laws. But now that this Statute doth forbid the Delivery of him to the Ordinary, it retains all Power to it ſelf, and denies the Ordinary's.

And therefore I am of clear Opinion, that if the Ordinary at the Common Law would have convented a Church-man to deprive or degrade him for Felony, before his Trial at the Common Law, that the Prohibition ſhould have lain, for holding a Plea of a Cauſe of the Crown, and the Prejudging the King's Court, in eodem. Much rather than in the Marqueſs of Winchester's Caſe, Co lib. 6. 23. where a Prohibition was granted, to ſtop the Probate of a Will for Goods, becauſe the ſame Will did alſo give Lands, For though in Truth perhaps the Will be made all uno flatu, and interlaced within one Continent or Writing, yet in Effect they are two Wills, and of divers Natures, Effects, and Conuſances; whereas in the other Caſe, the Crime is all Temporal idem individuo, and the End of the Conuſances is only divers: That is with us Capital, with them Deprivation, or Degrading, or the like.

Prohibition, Br. 17. Teſtament, Br. 20. 1 Syd. 217. Cr. Car. 94. Ant. 121. Styl. 228. Cr. Jac. 346. Yel. 52. 7. Co. 44. a.

Ant. 286.

And again, if after Trial of a Clerk, a Felon found Guilty or not Guilty, they will proceed to prove or diſprove any Thing againſt the Verdict and Trial, a Prohibition would likewiſe lie, except only in this one Caſe of Purgation after Conviction, performed according to due Form, as the Statute W. 1. ſpeaks, which the Common Law did tolerate. As if a Clerk were found not Guilty of Felony, and ſo diſcharged, if they would after convent him again, and admit new Proof that he were Guilty, to deprive him, they were to be prohibited: Or if upon a Clerk attaint delivered, abſque Purgatione, to the Ordinary, they would admit him to his Purgation, a Prohibition would lie, yea, and a Premunire too, rather than by a Plea of Lands holden by them, which is not ſo highly a Plea of the Crown as criminal Cauſes are; as among criminal Cauſes there are Degrees, as Treaſons, and even ſome againſt the King's own Perſon and Majeſty, as the Statute of 25 E. 3. cap. 4. before ſpeaks. Alſo if they would proceed between

tween Conviction and Clergy, Prohibition would lie for Prevention, becauſe the Cauſe is not finiſhed in the King's Court; otherwiſe it would be where Clergy is not allowed.

But if they would not controvert nor re-examine the Acts of the King's Courts, but build their Sentences upon them, they were not to be prohibited; as if they did deprive a Man by Sentence, becauſe he was convicted or attainted of Felony, Murder, or Man-ſlaughter at the Common Law. 2 Cro. 431. Ant. 121

But if they took him off the King's Court as a Clerk, and he were in Caſe that he might purge, as being only Convict, and the Purgation not reſtrained by the King's Courts, they could not deny the way of Purgation; for in that Caſe, there was a Writ to command it, upon which if he were purged, they could no farther Queſtion him, becauſe by their Law he was now cleared.

But if that Jury found him Guilty, then they might proceed againſt him as Guilty by their Law, and not proceed by ours; for though he had Power and Poſſibility of Purgation, yet that did not conclude the Purgation Actual. And the Book 38 E. 3. 2. is not againſt this, for it brings the Judgment of the Crime there to the King's Court incidently; as in the Quare Impedit where the Biſhop refuſeth a Clerk for a Temporal Crime. But a Sentence of Deprivation in the Eccleſiaſtical Court for a Temporal Crime keeps the whole Cauſe in the Spiritual Court, and ſo determines of the Capital Crime, though not Capitally, whereby they judge both of the Nature of the Crime, and the Validity of the Proofs, neither of which belong unto them. So that Caſe ſtands with my Rules.

Now the Law ſtanding thus, that the Clerk as well out of Orders as in Orders, praying his Book after Conviction (as the Law now is uſed) had two Benefits, the one to avoid Judgment and to ſave his Life, the other to make a kind of formal Purgation of the Crime. The firſt of theſe was a juſt and direct Favour granted unto him by the Common Law of the Land. The other was a Cuſtom entertained, by Colour of the Common Law among Eccleſiaſtical Perſons in their Courts, which the Statute, or Common Law, did rather Wink at than approve.

Now comes the Statute 18 Eliz. cap. 7. the Title Whereof for this Part is an Order for Delivery of Clerks convict without Purgation, and then recites that avoiding of ſundry Perjuries, and other Abuſes in and about Clerks convict: Be it enacted, &c. that every Perſon, that ſhall have the Benefit of his Clergy, ſhall not thereupon be delivered to the Ordinary, as hath been accuſtomed; but after ſuch Clergy allowed, and Burning in the Hand according to the Statute, &c, ſhall forthwith be enlarged by the Juſtice, &c. And be it enacted, that the Juſtices before whom ſuch Allowance is had, ſhall and may, for the further Correction of thoſe Perſons, detain and keep them in Priſon for ſuch convenient Time, as they ſhall think convenient, ſo that the ſame exceed not one Year's Impriſonment. Provided that ſuch Clerks ſhall be put to anſwer all ſuch Felonies, as meaning, that he ſhould never be queſtioned again for this. Poſt. 293

So by this Statute two Things are wrought. Firſt, Life is preſerved, which is the proper Act of Common Law.

The other, the Purgation, which was the Uſurpation upon the Common Law, is utterly aboliſhed, whereby the Statute ſaith truly, that ſundry Perjuries, and other Abuſes, were avoided. Stamf. 137.

The Perjuries indeed were ſundry: One in the Witneſſes and Compurgators; another in the Jury, compounded of Clerks and Laymen. And of the third, the Judge himſelf was not clear, all turning the ſolemn Trial of Truth by Oath, into a ceremonious and formal Rye.

The ſundry Abuſes the Statute ſpeaks of were firſt, the Diſhonour and Derogation of the Law of the Land, and the King's Court, yea, and to the State and Government it ſelf, all which were deluded by this Maſk; all which nouriſhed that pernitious Error and Schiſm of State, that Clerks were not Subject unto the King's Courts or Laws: Another, that by counterfeit Verdict, De crudelitate, they did fruſtrate both the Jury of Indictors De crudelitate, and the Jury of Triers De ſcientia & mera veritate.

So the Statute 18. doth expreſly abolish the Purgation, which being now only after Conviction, could not be freed from these Perjuries and Abuses meant by the Law; and the Means whereby the Statute doth abolish it, is by denying the Delivery of the Clerks convict to the Ordinary; for by that the Purgation muſt needs cease, which never was, nor could be but before those Judges, and in their Courts.

But now this Statute taking away Purgation, never meant to abate or abridge the Benefit of Clergy, but to give it by the proper Means, and in the proper Place, and by a more ready and direct Means, without Circuit or Delay.

And therefore it is said first, that they shall be admitted and allowed to have the Benefit and Privilege of Clergy, that is the general Purview of the Law. And the Manner how it follows, Negative, how it shall not be; Affirmative, how it shall be. That is, he shall not be delivered to the Ordinary, an unfit Judge to make his Purgation, an undue and unsufferable Means how to make it, but shall forthwith be enlarged and delivered out of the Prison by the Justices, that granted the Clergy, the proper Judges in Court.

Now since this Statute hath taken away all Power from the Ordinary in Case of Clerks convict, and hath resumed all to it self, to whom it did Originally belong; this Court shall now finally determine the Cause, and shall leave nothing to be further done in it, in any other Court. And therefore it saith, that he shall have the Benefit of Clergy, his Life shall be saved, and he shall be inlarged and delivered out of Prison; that is, freed a pœna, and by Consequence a culpa; and then provides, that because some Offenders may be so enormous that may deserve some further Punishment, it gives a Latitude of Power to the Judges, to continue, by their Discretion, the Offender in Prison for his farther Correction, so that it be not above one whole Year.

And so it appears plainly, that the Statute hath prescribed both the free Discharge of the Offender regularly, and the Height of Correction the highest Offence capable of Clergy can be subject unto.

Now then the last Question is, in what Manner the Statute works this Discharge and Freeing of a Clerk a pœna & culpa, whether by Supply of Purgation, as it was at the Common Law; or by a kind of Statute Pardon.

I say not by a Supply of Purgation, for divers Reasons.

1. First, all Clerks delivered to the Ordinary, were not receivable nor capable of Purgation, as those that were delivered absque Purgatione, as by the Discretion of the Court, enormous Offenders, Clerks attaint, and the like were.

2. Though they were capable of Purgation, they were not to be purged, for the Jury had Power over them.

3. This were more to discredit the Acts of the Law than before; for then Jury went against Jury; a kind of Equality of Trials pro & contra, and with them there being some Clergy-men of higher Esteem and Faith: But this were to falsifie our Juries without any equivalent Opposer, and in their own Court, and by the same Law, which is oppositum in objecto.

4. Where they complain of Abuses in Purgation of Clerks which were abolished, this were no less than the former, though without Perjury.

5. There was never Purgation in this Case by Common Law.

Therefore the Statute never warrants to do that the Law never did, nor allowed; therefore I hold it works by way of Pardon, which affirms, and doth not dis-affirm the Verdict.

If you say there is no Word in the Statute of Pardon, I say, that there is much less either Word or Meaning of Purgation; yet Heston's Case, 41 Eliz. cited in Foxley's Case, Co. lib. 5. 110. allows the Statute to work both in Nature, and in View of a Purgation; and also of a Pardon by good Constructions of Law.

Now (as I have said) there was no Reason to intend the Statute of Purgation: So if it amount to a Pardon, that alone is so sufficient, as there is no need of a Purgation, or the Effect of it.

Neither

Neither is it the work of Common Law to purge the Offence that the Law hath found and established, and so destroy their own Work; but to pardon is natural, being an Act of Common Law, for an Offence at the Common Law, and affirms the Verdict, and dis-affirms it not, as the Purgation doth. So that to take it for both is to imply Contradictories.

Now the Exposition of the Statute belongs to the King's Court of Law, as it is said in Burton's Case, Co. lib. 6. 13. A Parson was deprived for Adultery; afterwards a general Pardon came, which pardoned the Adultery. It was judged that the Parson ipso facto was restored to his Benefice without Suit in the Ecclesiastical Court, because the Judgment of this Pardon, and the Force of it belongs to the Temporal Court, and not theirs. Latch. 22. 6 Co. 14. a. 9 Co. 119. b. Syd. 164.

Now the Words of the Act do apparently prove, that the Meaning of the Statute was to free the Clerk convict from Burning in the Hand, and from all further Punishment; and therefore mentions, that he shall have the Privilege and Benefit of his Clergy, which imports, that he shall have as much Benefit by his Clergy as he should have had, which is Saving his Life, and Freeing from the Crime, ut in pluribus it Was.

But next, that he shall not have it by means of the Ordinary, and by the way that had been accustomed, but only and immediately by the Judges; and that by the Way of a present Discharge, shall forthwith be enlarged and delivered by the Justices.

And because the Party should be understood to be absolutely freed and discharged, the Statute takes from the Judges all Power of further Punishment, but by the mild Word of Correction gives them Power to detain them in Prison one Year and no more. And the Statute provides, that the Clerk shall answer all other Felonies, as fearing, lest the general and free Discharge should be taken to extend to all Felonies: But to this they meant not that he should be any ways put to answer. Ant. 291.

Now this Ordinance Working the Effect of a Pardon, must needs be understood a Pardon, though the Words be not so verbally, like unto the Case upon the Statute De donis conditionalibus which do not make an Estate in Tail by direct Words: But whereas the Estate that is now judged Intail, was a Fee-simple and alienable, post prolem suscitatam, &c. It ordains, that the Donee should have no Power to Aliene, but it shall come to the Issue, or return to the Donor if the Issue fail. So this is a Periphrasis of a Pardon in Effect, Br. Corone 204. Stat. 6 R. 2. If a Wife be ravished, the Husband shall have the Suit to have the Offender convict of Life and Member; this makes it Felony. 5 H. 4. Cutting off Tongues incurs pain of Felony. This makes it Felony, Charta de Forresta, no Man shall lose Life or Member for killing of the King's Deer, it is by that made no Felony. But not the Statute of Money that gives, for bringing in of Money rounded or counterfeit, Forfeiture of the Body of the Offender; this makes no Felony, but imports only perpetual Imprisonment, that is the Liberty, and as it were the Use of his Body; for Felonies and capital Crimes shall never be made by doubtful and ambiguous Words: And upon the like Reason I hold, that the 5 R. 2. cap. 2. that of exporting of Money gives Forfeiture of as much as the Offender may Forfeit, that such general Words will not make a Felony for which the Offender shall lose his Life, but he shall forfeit his Lands, against himself and his Heirs, not against his Heirs Intail, nor his Wives Dower. And as cessante causa cessat effectus, so there are some Effects so incident, that if they are not found, you may affirm that there is no Cause which must produce such an Effect. For though Heat makes no Fire, yet you may affirm, that there is no Fire where there is no Heat. 13 E. 1. cap. 1. Ant. 270. 2 Inst. 587.

And take the Law to have none other Effect but to set him at large, and to leave him still as a Felon convict enlarged, then could he not acquire Goods, as by the Judgment he may. 5 Co. 110 b, Hales pl. Cor. 241.

And therefore I hold, that if a Man shall call him Felon, or Thief, he may have his Action, as upon any other Pardon, which we resolved in the Case of Cutdington vers. Wilkins. Trin. 13 Jac. Rot. 933.

Now

Now it is plain, that this Man can be no more impeached nor convented at the Common Law for this Crime, being a Temporal Crime; and therefore much leſs in the Spiritual Court, which can hold no Plea of a Temporal Crime, though it were in his full force at the Common Law. And that was the Reaſon of the Precedent, N. 27 & 28 Eliz. Rot. 2574. in the Caſe of Matthew Nichols, Vicar of Saint Merrin in Cornwall, who was convicted of Felony, before Manwood and Anderſon, and burnt in the Hand, and was afterward impeached by one William Chaffe in the Eccleſiaſtical Court, contra debitam legum hujus Regni Angliæ formam; affirming, that the Vicarage was void by reaſon of the Conviction, and that he was preſented thereunto by the Queen; and ſo prohibited his Suit, which is the very Caſe. That after the Diſcharge of the Clerk convict by the Statute, he could not be queſtioned for it in the Eccleſiaſtical Court, as for an Offence to make the Church void by Sentence of Deprivation.

Ant. 81. 2 Ro. 22, 305. 2 Cr. 430. Ant. 67.

2 Ro. 222. 2 Cr. 43.

Now though the Statute ſaith, after Burning in the Hand according to the Statute in that Behalf, he ſhall be diſcharged, and here is no Burning in the Hand; that makes nothing; for the Statute 4 H. 7. cap. 13. that gave Burning in the Hand, excepts Clerks in Orders: And though 32 H. 8. cap. 3. appoints expreſly, that they ſhall be burnt as well as others, yet 1 E. 6. cap. 12. gives Clergy in like Manner as it was in 1 H. 8. whereby the Clergy are reſtored to their former Privilege, which yet was not obſerved in the ſame Caſe of Nichols, as aforeſaid. But though it were in a Caſe where the Hand ought to be burnt, yet it was not ſo eſſential, but a Man may have the Benefit of the Statute though he be not burnt. And the King may Pardon the Burning; for the Burning even in an Appeal, is no Part of the Judgment, or ſo much as in the Nature of the Puniſhment, but rather a Mark to notifie that he may have his Clergy but once.

5 Co. 5. b. 110. b.

5 Co. 50. iſſint in Quæ in Dyer, 201, & 202. bren' Res. 3 Inſt. 114.

So where the Statute ſays after Burning, it imports, where Burning ought to be; otherwiſe the Statute ſhould do no good to Clerks, for whom it was moſt intended.

Star-chamber. (377) Huſſey *verſus* Cooke.

Paſc. 18 Jac. Regis.

IN the Star-Chamber, in the Caſe between Henry Huſſey Plaintiff, and Cooke and others Defendants; it was affirmed in the diſcuſſing of the Cauſe, that the Party himſelf, or his Servant, or as that Caſe was, the Son, or near Kinſman of Miſtreſs Leyton, the Defendant might ride, or go for her to procure the Jury to appear, there being no other ill qualified Circumſtance in it: But if either the Party, or any other ſhould ſolicite any of the Jury not to appear, it was puniſhable; for that doth both delay Juſtice, and is a kind of Packing of a Jury.

Dy. 48. a. Co. L. 157. b.

Alſo if the Party, or any other do move any Man to attend, or be in Readineſs to appear, upon a Tales, if there ſhall be one De Circumſtantibus; that is alſo puniſhable for the ſame Reaſon. And in that Caſe it was alſo agreed, that if a Witneſs depoſe, that the Defendant did perſwade a Juror to appear, and to do him reaſonable Favour, or Words to the like Effect; that this is no ſufficient Proof in Criminals, becauſe the Court muſt know the very Words, to judge of their Force and Effect.

Slade

(378) Slade *verſus* Drake. Prohibition.
Mich. 15 Jac. Rot. 2438.

ROger Slade brings a Prohibition againſt John Drake Eſquire, Farmer of the Rectory of Axminſter, and declares, that whereas Richard Gill late Abbot of the Monaſtery of Newham in the County of Devon, was ſeiſed of a Meſſuage and divers Lands, Meadow and Paſture, Parcel of the Poſſeſſions of that Monaſtery, to the Time of the Diſſolution in Fee. And whereas alſo the ſame Abbot, by himſelf and his Farmers, at the Time of the ſame Diſſolution, did hold and enjoy the ſame acquitted and diſcharged of all manner of Tythes, and ſo ſeiſed ſurrendred the ſame 30 H. 8. and then recites the Clauſe of Diſcharge of Tythes in the Statute 31 H. 8. and then brings down the Land by Deſcent to Queen Elizabeth, and from her to the Duke of Norfolk, and from him to the Lord William Howard: And that he, by Indenture inrolled in the Chancery, within ſix Months, did bargain and ſell the ſame unto the Lord Peter and his Son, 3 Jac. and they demiſed it unto Slade the Plaintiff, and then Drake the Defendant did ſue him in the Conſiſtory Court of the Biſhop of Exeter for Tythe of Wheat, and other Grain, againſt the Form of the ſaid Statute. Devon. Drake. Jones, 6. 1 Cr. 422. Diſmes, Br. 17. Winch. Ent. 648, & 650. Noy. 97. 2 Ro. R. 250. Cr. El. 206. Benl. 163. 2 Ro. R. 479.

Whereupon the Defendant demurs in Law generally, and prays a Conſultation. Judgment.

Upon this Caſe after ſolemn Argument, Judgment was given for the Defendant, and a Conſultation awarded, Warberton diſſenting.

In the Argument of this Caſe I made two great Points.

The firſt, whether the Declaration were good or no? And I held it not good.

The ſecond, whether the Fault of Declaration were in Subſtance, ſo that Advantage might be taken of it upon general Demur? And I held the Fault Subſtantial. I firſt profeſſed, if my Judgment ſhould take Counſel of my Intereſt or Affection, I ſhould be of another Mind, but I was bound within former Rules of Juſtice, Precedents, Religion and Prudence. Juſtice, ſuum cuique tribuere, Tythes to whom Tythes belong. Precedent, State ſuper ſemitas antiquas. Religion, Merito ſumma habetur ratio, quæ pro Religione facit. Prudence, Quod dubitas ne feceris. De non apparentibus & non exiſtentibus eadem eſt ratio.

(379) Now to the firſt Point.

LIttleton ſays, that the Pleading is the honourable, commendable, and profitable Part of the Law, and by good Deſert it is ſo. For Caſes ariſe by Chance, and are many Times intricate, confuſed and obſcured, and are caſt into Form, and made evident, clear and eaſie, both to Judge and Jury (which are the Arbitrators of all Cauſes) by good and fair Pleading. So that this is the principal Art of Law, for Pleading is not Talking; and therefore it is required that Pleading be True; that is, the Goodneſs and Vertue of Pleading; and that it be certain and ſingle, and that is the Beauty and Grace of Pleading.

Therefore the Law refuſeth double Pleading, and negative Pregnant, though they be true, becauſe they do inveagle, and not ſettle the Judgment upon one Point. The Law loves ſingle Pleading, abhors double.

Therefore firſt, General Pleading is diſallowed though it be in Matters of Fact, as a Covenant to make Eſtate by the Advice of J. S. he muſt ſhew what Advice he gave, 26 H. 8. 1. 16 E. 4. 9. 2 Cro. 560.

Condition that the Obligee ſhall enjoy an Office according to a Grant of Letters Patents, he muſt not plead in hæc verba, but he muſt ſhew the Effect of the Letters Patents, and the enjoying accordingly. 2 Cr. 560.

But becauſe it hath been ſaid, this is a Spiritual Act (which yet I grant not to be ſo) he that pleads Depoſition of an Abbot, he ſhall plead before what Ordinary, 9 E. 4. 24.

So

So Debt upon Leaſe of a Vicarage, the Defendant pleading a Sequeſtration, muſt ſhew by what Ordinary, for what Cauſes, as for Non-Reſidence, or the like, and legal Proceſs of Sequeſtration, 5 E. 4. 29.

So Union of Chapel muſt be ſhewed; by whom; Scil. the Pope or Biſhop, not generally, Concurrentibus iis, &c. 11 H. 7. 8.

7 Co. 43. b. Ant. 226. In pleading a Divorce, you muſt ſhew before whom it was, and ſet forth the Cauſe of Divorce, 11 H. 7. 27. but all the Proceedings you ſhall not need, as you ſhould of a Recovery at the Common Law, 21 E. 4. And therefore

5 Co. 58. a. in Specot's Caſe, C. l. 5. 57. the Biſhop cannot plead Cauſe of Refuſal, Schiſmaticus inveteratus: Nor upon the Statute 4 H. 4. that a Man was defamed of Hereſie. But they muſt ſpecifie the Schiſm or Hereſie, though they be

Dyer 254. b. Matters of meer Spiritual Cognizance. Vide Dyer, 8 Eliz. 154. Haunter of Taverns, Player at unlawful Games, & ob alia diverſa crimina criminoſus.

For this is regular for Difference between the King's Courts and the Courts Eccleſiaſtical, that though a Spiritual Cauſe cannot Originally and Primitively fall into the King's Court.

4 Co. 20. a. As for calling of a Man Heretick he ſhall not have an Action of the Caſe, 20 H. 8. Yet if a Civil Action be well commenced, as in the Caſes cited, a Quare Imped. or an Action of falſe Impriſonment, if any thing fall incidently, that is Spiritual, the King's Court ſhall continue the Plea upon it either by Jury or Demurrer, except in Caſe where the Law hath provided

Ant. 179. Co. L. 74. a. Plo. 14. b. Trial by Eccleſiaſticks, as by the Iſſue upon Baſtardy N'unques accouple, &c. literature, and the like: In which Caſes the Biſhops are not Judges but Miniſters of the King's Courts, as other kind of Triers are; whereupon the Court proceeds to Judgment according to their Certificates and

Yel. 173. Trials. But on the contrary, if a Caſe begin well in the Spiritual Court as being Spiritual, and a Point fall incidently, that is of Temporal Cogni-

Yelv. 92. 2 Cr. 270. Co. L. 96. b. zance, it is clean Contrary: For the Trial is called from them, as in daily Experience, in Preſcription and Limits of Pariſhes, in Suits of Tythes.

Ant. 106, 107. Cr. Jac. 340. 2 Cro. 363, 165. Cr. El. 253, 393, 477 2 Co. 48. b. Dyer, 43. a. Mo. 857. 1 Cr. 384. 2 Cro. 503, 634. 2 Cr. 165, 638. 3 Cr. 916. Dy. 43. a. Now if it be a Point of Diſcharge, that is to be pleaded as this Caſe is, it muſt ever be pleaded ſpecially, and ſhewed to the Court how the Diſcharge is; for it is no Diſcharge if it be not ſufficient, and the Sufficiency is Matter of Law, and therefore muſt be ſeen and judged by the Court. As is 22 E. 4. fol. 40. And Manſel's Caſe, Co. lib. 2. fol. 3. Moor, 857. Deut. 135. H. 7. 8. t. 6 H. 7. 6. t.

Now touching the Diſcharging of Tythes themſelves, and the Pleading of them at the Common Law; it is to be obſerved, that they are Things of

2 Co. 44. b. Common Right, and do of right belong to the Church. And therefore though it be true, that before the Council of Lateran, there were no Pariſhes, nor Pariſh Prieſts that could Claim them, but a Man might give them to what Spiritual Perſon he would, yet to the Church he muſt give them. Yet ſince Pariſhes were erected they are due to the Parſon, (except in ſpiritual regular Caſes) or Vicar of the Pariſh; and therefore when you have a Prohibition of Diſcharge of Tythes, you muſt conſider it is a Plea in Bar againſt Common Right, to a Demand of Tythes which is a Common Right, though they be in ſeveral Courts, as by a Releaſe either in Deed or Law.

Now then if you will diſcharge a juſt Demand, you muſt ſatisfie the Court of your Diſcharge: Conſider then the Kinds of Diſcharge of Tythes, the Perſons capable of them, and the Means how.

The Perſons or Bodies capable of them, are either Spiritual or Temporal.

Temporal I ſay when they were Temporal, when the Diſcharge did firſt veſt in them: for otherwiſe if the Temporal Man ſucceeds a Spiritual Body in Diſcharge, as upon the Statute 31 H. 8. it is to be reckoned in a Spiritual Perſon or Body, not in Temporal.

Diſcharge of Tythes. 3 Cr. 316. 2 Cr. 608. The Spiritual Perſon had four ordinary ways of Diſcharge, that is, firſt, Bull of the Pope: Secondly, Compoſition: Thirdly, Preſcription, and theſe were abſolute.

Fourthly,

Fourthly, Order, and that was limited ſo long as Land remained in the Manurance of the religious Perſons themſelves; and theſe were the Ciſtercians, the Templars, and the Hoſpitalers of Jeruſalomitans: But Unity of Poſſeſſion of the Parſonage appropriate, and the Land Tithable was no Diſcharge, nor ſo holden at the Common Law: But how that came into Uſe, and upon what Reaſons, and with what Cautions, and how deducing in Pleading, I ſhall ſpeak after, when I come to the Statute of 31 H. 8. 2 Co. 47. b. Po. 306.7. 2 Cro. 608. Mo. 913. Dy. 277. b. 11 Co. 13. b.

Now clearly at the Common Law, the Spiritual Perſon could not claim his Diſcharge by Bull, Compoſition or Order; but he muſt plead it with his Ground and Reaſon ſpecially: But his Diſcharge by Preſcription was allowed him without any other Reaſon, becauſe he was a Perſon capable of ſuch Diſcharge. And ſo the Original was probable, and therefore the Preſcription was allowed him as in other Caſes immemorial, whereof the Original cannot be found, but is ever preſumed juſt. 2 Cr. 206.

Now Temporal Perſons, (not to ſpeak of the King, which was a ſpecial Caſe, 22 Aſſiſes) had two Ways to obtain Tithes, or to diſcharge Tithes; the firſt was by Grant of the Parſon, Patron, or Ordinary; the other was by a Preſcription; but that was ever, not præſcriptio ſimplex, but compoſita, not a Preſcription ſingle, but compounded, differing from the Caſe of the Spiritual Perſons. And ſo is Piggot's and Heron's Caſe. Ant. 40. 2 Co. 44. a. 44. b. 2 Co. 45. a.

And ſo are the common Caſes where Men have the Diſcharge of Tithes in Kind, by paying Compoſition for them in Money or Land or Penſion, held or enjoyed by Parſons and Vicars in Lieu of them, 8 E. 4. F. N. B. &c. Ant. 38. 2 Co. 44. a. 19 H. 6. 75. a. Ant. 42, 43.

But now Note a ſtrange Anomalum in this Caſe, Tithes differing from all other Caſes in Law.

For whereas Preſcription and Antiquity of Time fortifies all other Titles, and ſuppoſeth the beſt Beginning that Law can give them: In this Caſe it works clean contrary. For whereas a Grant of a Parſon, Patron, and Ordinary is good of it ſelf without any Recompence or Conſideration, when it runs out to Preſcription, it dies and periſhes; whereof no other Reaſon is given, but that our Books ſay, that a Man may preſcribe in Modo decimandi, but not in non decimando: And this is in Favorem Eccleſiæ, leſt Laymen ſhould Spoil the Church. 2 Co. 44. b. 13. 16. Dav. 6. b. Accord.

But I will make another Reaſon not diſſonant from Law.

There are Preſumptions of Law ſo violent, as though they be falſe, a Man ſhould not be received to aver againſt them as in a Precipe. The Tenant pleaded himſelf Villain to T. S. and that he hath nothing but his Villainage; the Demandant had no Reply though it were falſe; but his Writ muſt needs abate till the Statute 37 E. 3. did admit the Counterplea: Manſel's Caſe & 16 H. 7. So in Replevin, if upon Avowry the Tenant diſclaims, he ſhall have Judgment, though it be falſe; for the Law believes that theſe Parties will not do themſelves Wrong in ſo high a Degree.

The like Reaſon moves in this Caſe: The Law preſumes violently that a Layman cannot be abſolutely diſcharged of Tithes: And therefore will not allow a Preſcription of ſuch Diſcharge, holding it more reaſonable that ſome one Man ſhould ſuffer a Miſchief to loſe ſuch a Privilege, being ſo improbable and of ſo dangerous Conſequence, than for his Particular to admit a Spoil of the Church, and a Decay of Religion, according to the Rule, Omne Magnum exemplum aliquid habet ex iniquo, quod publica utilitate compenſatur.

So, though you ſhall be allowed your Diſcharge by Grant, when it appears, yet when it appears not, ſtabitur preſumptioni donec probetur in contrarium.

Now the Common Law, as touching the diſcharge of Tithes, and the Forms of Pleading of it ſtanding thus. The next Queſtion is what Change the Statute of 31 H. 8. of Monaſteries hath made in that Behalf.

And I am of Opinion that it hath made two main Changes.

The First, That it hath by Force of the Clauſe of Diſcharge preſerved and continued certain Diſcharges that were before the Statute, that is by Bull, Compoſition, and Order, and conveyed them over to the King and Lay-Perſons, which elſe would have vaniſhed and diſſolved with the Spiritual Bodies themſelves whereunto they were annexed. 2 Cr. 559. Dy. 277. b. 2 Ro. R. 143, Mo. 913. 3 Cr. 579.

11 Co. 40. b. The next is, That it hath created and made one new Discharge, which was not before at the Common Law, that is the Unity of the Possession of the Parsonage and the Land tithable in one Hand.

Post. 309. And this was long controverted, and now is a received Opinion, by the Determination of the King's Courts to be de Lege, a Discharge within the Meaning of the Law, as the Divines say that Articles are made de Fide by the Determination of the Church.

But in this Case of Unity, four Things are to be observed.

1. First, That it is no Discharge of Tithes, but (as it is well observed) a 4 Le. 47. Pl. 124. Discharge of the Payment of Tithes; and therefore if it be pleaded by way 11 Co. 14. b. Ante 44. of Discharge generally, and the Jury find nothing but a perpetual Unity, it is found against the Pleader, and so much is agreed in Priddle and Napper's Case.

2. It is no Discharge except it be by Prescription.

3. If it be perpetual, yet if it be alledged that the Abbot, or his Farmer paid 11 Co. 14. b. Tithes, that doth destroy the Prescription, because that proves that there was no real Discharge, but a Non-payment by Unity only: Yet an Unity by Prescription is good prima facie, but not of it self, but in Contemplation of a perfect Discharge, that shall be supposed, though it cannot be found for the Infiniteness and Impossibility of Search of Things beyond Memory.

4. Lastly, Though Unity perpetual be allowed, yet it is not well pleaded ex- 2 Co. 48. a. 11 Co. 10. a. cept you add that ratione inde they held discharged of Payment of Tithes Time out of Mind; for though the Unity shall be traversed, and not that Conclusion or Consequent, yet that Conclusion fixeth it to the Statute, and answers the real and perfect Discharge that is presumed under the Unity, to which the Unity it self is but augmentative: But yet I am of Opinion, it is but a Fault in Form, which will be cured by a Verdict or general Demurrer.

This Discharge by Unity being the only Discharge that is created and made of new by this Statute, all other Discharges are not otherways preserved but by these Words, [That the King, his Heirs and Successors, and such Persons their Heirs and Assigns, which shall have and hold them according to their Estates and Titles, be discharged and acquitted of Payment of Tithes, as freely, and in as large and ample manner as the said Abbot had or held the same at the Day of the Dissolution of the same.]

So first it is plain, That this Clause gives neither new Discharges nor enlarges the old, but continues and bounds them within the Limits of those that were enjoyed by the Abbot both by Word and Meaning according to the Cases, Tot, tanta, &c. For though Unity (as hath been said) be now used for a Discharge, yet it is not so for it self, but for a more perfect, which is presumed though it appears not.

Now this being the Substance and Body of this Clause in Word and Meaning, it is strange it should be moved, that out of this Clause may be drawn a Conceipt of a Liberty given to the Possessors of Abbey Lands, to plead their Discharges in other Form, and with more Generality and Favour than the Abbots themselves had in those Cases: Against which the Reasons are many.

1. First, The Word is expresly touching the having and holding of them, not a Touch nor a Glance of the Pleading of them, which is meerly Heterogeneum.

2. Secondly, If these Words should be extended to pleading, it would turn expresly against them; for then it must be understood, that they shall have the Benefit of Pleading, in as large and ample manner as the Abbots had. Which implies a Negative, that it shall be in no other nor larger Manner; for the Rule is, That Affirmatives in Statutes, that introduce new Laws, do imply a Negative of all that is not in the Purview.

Ante 255. Co. L. 348. b. And therefore in Amy Townsend's Case, Plow. 111. it is adjudged, as it hath been since, that Where one comes to a Possession by an Use out of a State discontinued, so that the Entry was not lawful to the Cestui que Use, such a Possession works no Remitter, because the Statute appoints the Possession in the same Manner and Form (which imports a Negative, and no other) as are in Use.

So the Statute Westm. 2. appoints that the Demandant in Quoad ei deforceat may vouch ac si esset tenens; if in the first Action he could not vouch as if it were a Scire fac. then cannot he vouch in the Quoad ei deforceat, being Demandant, 14 H. 7. 18. 1 Co. 62. b.

Thirdly, if you shall admit this Exposition upon this Cause, you must admit it also upon the Body of the Law, upon the like Words, which are thus: The King shall have and hold, to him, his Heirs and Successors, all Monasteries, and all their Lands, Tenements, Rents, and in as large and ample manner as the Abbots had the same, at the Time of the Dissolution: So then it shall suffice to plead, that the Abbot was seised of a Rent-charge out of my Land at the Time of the Dissolution, &c. without shewing any other Title. And so of other Statutes; and this kind of Pleading hath the same Pretence of Loss of Writings, of Grants, of Rents, Reversions, and the like, and Infiniteness of Search, and more than the Case of Bulls and the like. 3.

4. This Form of Pleading that lies so open and obvious in Words of the Statute, and was so easy and pleasing to them that sought Discharge, was never to this Day amongst so many busy Wits ever offered in any authentick Pleading, much less received the least Allowance, by the Opinion of any learned or grave Men, but the contrary by the Specification of the Discharges, except in the Case of Prescription: And yet in the Case of Unity, though it be by Prescription, it is also specified. 4.

5. Lastly, This were to take a Statute contrary to the Common Law, which trusted not Laymen with their Prescriptions; and yet now you will trust them without Prescription, with that that belongs to the Court to judge. And this is against a main Rule in expounding Statutes, especially in Odiosis. 5.

So no Man but can see what Absurdities would follow by admitting a Change of regular Forms of Pleading to vulgar Speech, used in Acts of Parliament, to express the Meaning which are every Day by the Judges, extended, restrained, and changed, according to a better Rule of Reason and Justice than the Words bear. And if the Word rule not in Substance, much less in the Forms of Pleading, which is the Art of Law, as hath been said: And this Precedent of Irregularity of Pleading is as ill in Consequence as the Principal.

So the Statute of 4 H. 4. of Heresy before-mention'd, was not pleaded as the Statute went in General, but the Heresy specially assigned. 1.

Now take the Statute 34 H. 8. cap. 20 that provides, That if the Tenant in Tail of the Gift and Provision of the King, suffer a Common Recovery, the Reversion or Remainder then being in the King, that such Recovery shall not bind the Heirs in Tail, but that they may enter after the Death of the Tenant in Tail; Will any Man say that the Heir may plead, that his Ancestors were Tenant in Tail of the King's Provision, and Reversion or Remainder in the Crown, when he suffered the Recovery. 2. 10 Co. 37. a.

So in the Case of 11 H. 7. cap. 20. if any Woman (being Tenant in Tail of the Gift of any the Ancestors of the Husband) discontinued, the same shall be void, and that it shall be lawful to the Person to whom the Interest after the Death of the Woman shall appertain to enter; Will any Man say that it were well pleaded in these Words, without shewing how the State grew, or how the Discontinuance was made? And yet he that is to take the Benefit, may be a Stranger to the Conveyance, as upon a Covenant to raise the Use. 3. Ant. 235. Plo. 42. a. b.

So upon the Statute 32 H. 8. of Conditions, these are no Mischiefs to the Discharges that were before Time out of Memory of all Sorts; For they must be maintained and pleaded by Prescription, even Unity it self may be so. Neither is there any Mischief in Effect to those Discharges, which were created since Memory, if they be true, and the Original unknown; for they may be both supposed and pleaded by Prescription: For they had their Effect of Discharge, and the Prescription cannot be impeached, but by shewing a late Original of such Discharge, which if the Adversary can shew, the Party himself may much better: So then there remains no Prejudice but in one Case, where there can be no reasonable Presumption of a lawful Discharge, which is where there cannot possibly be a Discharge by Prescription: 4.

tion; that is, where either the Abbey was founded, or the Lands purchaſed to the Abbey ſince Memory; in which Caſe to preſume a Diſcharge even to the laſt Times, where there is no Appearance of it, is as much as to ſay, all Abbeys have Diſcharges for all their Lands, which may be extended even to Orders that had Diſcharges thereby for their own Manurance; for they might alſo obtain by Bull or otherwiſe, general and abſolute Diſcharges; and this may be concluded, that if this Form of Pleading be once received, you ſhall have all others left, and this only uſed, which is one of the weighties Reaſons that makes me explode it, conſidering the buſy Wits, that have uſed all Means to win Diſcharges and Forms of Pleading to that Purpoſe, and yet never took Boldneſs to offer this; and what needed all the Labour about Unity by Preſcription, or without Preſcription, if they might have pleaded Diſcharges at the Time of the Diſſolution: For it is eaſy to prove a Non-payment, by Reaſon of an Unity for any Time, and Non-payment is the common Evidence for the Proof of a Diſcharge ſufficient, which may be proved when a perpetual Unity cannot be.

Diſcharge in Abbots muſt now be proved a poſteriori, for no Man living can now ſpeak to the Time of Abbots. As to the Caſe of Wimbiſh and Talboyes, it is no Authority; for the Judges are divided two to two. Secondly, Both Parties pleaded their, viz. Covin and Deceit were Matter of Fact.

And as to the Caſe of Strata Marcella; that is no Authority at all; for no Judge ſpeaks a Word to that Point, and the Judgment paſſeth againſt him that pleaded ſo. But that indeed was upon another Reaſon and Point.

1. And as to Coke's Opinion in this Caſe of the Biſhop of Canterbury, lib. 2. 48.
1 Co. 542. 11 Co. 14 b. I anſwer, Firſt, That the Opinion makes not at all to the Judgment of the Caſe, to ſay that by the Statute 31. ſuch a Diſcharge may be pleaded.

1. Next it is no Part of the Reſolution of the Court, but an Addition of his own, and that ſudden and interpoſed.

3. Thirdly, It is ſo imperfectly ſet down, that the Prior, &c. ſo it may be the Prior and his Predeceſſors.

4. And that ſuch an Allegation is commonly uſed in Prohibitions, which argues plainly, that either he miſtook the Practice, or the Book miſtook him, which I rather believe, which is made the Ground of his Opinion: For there is no Authentick Precedent, much leſs Judgment or grave Opinion to that Purpoſe.

5. And again, that Caſe of Wincheſter, in the ſame Book, fol. 44. being both 38 Elizabeth, Pridley's Caſe, coming after 10 Jac. in his 11 Book, fol. 14. b. he makes theſe Queſtions, That if an Abbey have been Time out of Mind, and an Appropriation ſince, yet they may preſcribe in a general Diſcharge; for that may be, though a Unity come after. But ſaith he, If the Abbey it ſelf were founded ſince Memory, then he cannot preſcribe at all in the general Diſcharge, and ſo leaves it as a Caſe deſperate, where the Abbey was founded ſince Memory, which yet he might eaſily have relieved, if he might plead a Diſcharge, Time of the Diſſolution, without ſhewing how, which
11 Co. 15. a. is either a Retraction or an Explanation of his former Report.

Now to that which was well moved and objected by my Brother Hutton, That the Plaintiff hath not well conveyed himſelf to the Land charged with Tithes; I hold, that the Defendant, notwithſtanding that Defect, cannot upon the whole Matter have a Conſultation, if the Diſcharge had been well pleaded: For the Title of the Land is not in Queſtion, but whether the Land be diſcharged or no, which any Man that is anſwerable for the Tithes, may plead whether he have good Title to the Land or no: And ſince the Perſon in this Caſe hath ſued him for the Tithe, he hath enabled him to make his Defence, either by Plea of Diſcharge in the Eccleſiaſtical Court, where he needs no Title, or by Prohibition to the ſame Effect in the King's Court which is in Lieu of it. and ſuppoſeth that he offered his Plea there.

And this is regularly true. that if the Prohibition be Faulty, yet the Defendant ſhall never have a Conſultation, if it appear to the Court that the
Ant. 192, 115. 3 Cr. 165. 3 Cr. 766, 819. Dy. 170. Suit in the Eccleſiaſtical Court was not well founded, as it was there heard, though he might have had a Suit in another Manner.

And therefore M. 1 & 2 Eliz. Dyer 170. one ſued for Tythe-corn on 60 Acres of Ground; the Defendant in his Prohibition laid, that all was barren Ground, and paid no Tithes whereupon Iſſue was taken, and the Jury found that thirty Acres were ſo, and that the other thirty Acres were barren, but yet had paid Tithe Wooll and Lamb. The whole Court thought at firſt a Conſultation ought to be awarded for that Part; but yet upon better Adviſement, they reſolved the contrary: for he had no Right to purſue his Suit for Corn; and by the ſame Reaſon, if the Land be diſcharged, he ought not to ſue for the Tithes of it any more, whether he hath Title to the Land or no. Ann 115, 192. 5 Co. 61. b. Yel. 55.

I yold the Declaration groſly Faulty in another Point, that he hath laid no Eſtate of the Diſcharge of Tithes; for he hath not ſaid that Gill the Abbot was ſeiſed in his Demeſne, as of Fee diſcharged of Tithes, but hath made it two Sentences, that he was ſeiſed of the Land in Fee, at the Time of the Diſſolution diſcharged of Tithes, which may be true, if it were but for that Year by Grant of Parſon, Patron, or Ordinary.

The ſecond great Queſtion is, Whether the Demandant in this Caſe ought to have demurred eſpecially; for the Plaintiff hath laid, that the Land was diſcharged; which the Defendant by his Demurrer may have ſeemed to have confeſſed.

But I am of clear Opinion, that the general Demurrer notwithſtanding, the Defendant may ſtill take Advantage of the Fault.

The Words of the Statute are, That the Judges ſhall proceed, and give Judgment according as to the very Right of the Cauſe and Matter in Law ſhall appear unto them: So Right is as no Right, if it appear not to the Court, as we proved in the Caſe of Heard and Baskerveile, that not ſhewing of a Deed, or not producing the Letters Teſtamentary, or of Adminiſtration, or not laying a Place of Viſne, is not remedied by General Demurrer. Mich. 12 Jac. Rot. 653. Devon. Ant. 233. 2.

(380) Gawdy *verſ.* the Biſhop of Canterbury & alios. *Quare Imped.*

Hill. 17 Jac. Rot. 1840.

SIR Henry Gawdy Knight, brought a Quare Impedit againſt the Archbiſhop of Canterbury, Sir William Bird Knight, and Humphrey Rone Clerk, and declared that Richard Southwell was ſeiſed of the Manor of Popenho alias Walſoken Popenho, to which the Advowſon of the Church did appertain in Fee, and preſented William Maſters the Clerk, who was inſtituted and inducted, &c. and ſo ſeiſed 15 Jac. 24 Elizabeth for Money, did bargain and ſell the Manor ad quod, &c. to Thomas Barow in Fee; and Barow being ſeiſed, the Church became void by the Death of the ſaid Maſters, 2 Feb. 1588. and remained void by 18 Months, whereupon Queen Elizabeth in Default of Patron, Ordinary and Metropolitan, did preſent by Lapſe Francis Snell; who was thereupon admitted, inſtituted and inducted; and afterwards Barow did for Money bargain and ſell the Manor ad que, &c. to Richard Catlyn and Dyones his Wife, and the Heirs of Catlyn, who thereof enfeoffed Sir Henry Gawdy the Plaintiff, 12 October, 33 Elizabeth, and he ſo ſeiſed, the Church became void by the Death of Snell, and ſo remains void, and ſo it belongs to the Plaintiff to preſent, &c. The Archbiſhop claims nothing but as Ordinary, ſede vacante of the Biſhop of Norwich, and demands Judgment, if upon ſpecial Diſturbance, &c. Sir William Bird pleads ne diſturba pas. Humphrey Rone pleads, That he is Parſon impersonee of the Preſentation of the King, and ſaith, That long before Southwell had any Thing in the Manor ad quod, Queen Elizabeth was ſeiſed in Fee, as in Gross, of the Advowſon of the ſaid Church in Right of her Crown of England: And ſhe ſo ſeiſed preſented the ſaid Francis Snell to the Church then void who was thereupon admitted, inſtituted and inducted, and that the Queen died ſeiſed of the Advowſon, which deſcended to the King, who being ſeiſed, the Church became void by the Death of Snell; and thereupon the King, 4 Decemb. Norf. Gulſton. Vaugh. 13.

Decemb. An 16. presented the Defendant, who thereupon was admitted, instituted and inducted, and yet is incumbent there, absque hoc quod advocatio Ecclesiæ pred' ad pred' Manerium de Popenho alias Walsoken Popenho, pertinet, as the Plaintiff declared, and thereupon at Issue.

1 And. 270. 10 H. 7. 27.

The Jury finds that Southwell was seised of the Manor with the Advowson appendant, and presented the said Wiliam Masters, who was thereupon admitted, instituted and inducted; and that Southwell bargained and sold the Manor ad quod to Thomas Barow, and that the Church became void by the Death of Masters, 2 Feb. 1588. Whereupon Queen Elizabeth to the Church then void, 15 Feb. eodem Ann. presented Francis Snell by these Words, Per mortem naturalem ultimi Incumbentis ibidem vacant. & ad nostram præsentationem jure prerogativæ Coronæ nostræ Angliæ spectant. who upon the said Presentation the sixteenth of the same February, was admitted, instituted and inducted by Letters of Institution, running per Dominam Reginam veram & indubitatam ut dicitur patronam, and then conveyed down the Manor, ad quod, &c. to the Plaintiff, and that Snell died, and the King presented Rone the Defendant in these Words, Ad nostram præsentationem sive ex pleno jure, sive per lapsum temporis, sive alio quocunque modo spectant' & super totam materiam refer to the Court, whether the Advowson is appendant or not, prout, &c. And it was adjudged by the Court that Advowson remained appendant, notwithstanding the Queen's Presentation of Snell. For it appeared, that there was no Colour of Title to the Queen to present: No Lapse, for the Presentation, Institution, &c. were all in the same Month wherein the Avoidance was. And if there had been Lapse, that had not severed the Advowson; and Usurpation by the Queen it was not, because the Presentation supposed a Right where none was, and so was void; for the Queen meant to do no Wrong; and therefore this Case is stronger than Green's Case, where the Presentation is by Lapse, and the Title is by other Right: And therefore I said, That this Presentation of Rones was upon the same Reason void, and therefore the Usurpation by the King must not report any Right, but present to the Church, being void generally, and require Admission. &c. Now then the Presentation of Snell being void, it was but a Collation of the Bishop, which makes no Disappendancy, nor so much as Plenarty, but the Church remains void, as Green's Case saith, which is to be well understood, that it makes no binding Plenarty against the true Patron, but that he may not only bring his Quare Impedit when he will, but also present upon him seven Years after. And if the Bishop receive his Clerk, the other is out ipso facto, yet to all other he is a full Incumbent, (and not in the Nature of a Curate only) and shall sue for Tithes, and is capable of a Confirmation from the King; as the Book is 11 H. 4. 7. and Plowden in Greendon's Case, 498. And therefore the Chief Justice was of Opinion, that if the Patron brought a Quare Impedit upon it, he must be named, or else he could not be removed; and also that such a Plenarty did bar the Lapse of the Metropolitan and King.

6 Co. 29. b. 2 Ro. 350. 1 Cr. 592. Vaug. 14. Gold. 141. Yel. 7.

Hutt. 42.

(381) Holland *versus* Shelley & alios.

Mich. 17 Jac. Rot. 2710.

Suffex. Waller. Winch. Ent. 692 or 698. Owen 155. 1 Leo. 201.

Sir Thomas Holland brought a Quare Impedit against Sir John Shelly Knt. the Bishop of Chichester, now Bishop of Norwich, and Laurence Gibson Clerk, for the Benefice of Clapham, and Declared, that King Edward the Fourth, the seventh of December, Anno Regni sui (8.) did grant unto John Mowbrey, then Duke of Norfolk, by his Letters Patents in these Words: Quod ipse, Hæredes & Assignati sui habebunt omnia & omnimoda bona & Catalla quorumcunque felonum de aut pro quacunque felonia in aliquibus sive quibuscunque Curiis aut quacunq; Curia dicti Domini Regis, hæredum sive successorum suorum aut aliquorum qualitercunq; convictor' & convincend' damnator' & damnandor' fugitivorum & quorumcunq; utlegat' & utlegand' waviat' & waviand' & omnium & singulorum

pro felonia in exigend' qualitercunque poſit' & ponend' ac omnia bona & catalla quæcunque eidem nuper Regi Hæred' & Succ' ſuis, quocunq; modo ut prædictum eſt forisfac' & forisfaciend'.. ſive confiſcat' & confiſcand' infra Rapam ipſius Ducis nuper de Bramber in prædict' com' Suſſex & præcinct' ejuſdem Rapæ quoquo modo invent' & inveniend' exiſtent' & extunc fore contingent. And then conveys theſe Liberties to himſelf for Years, and the Advowſon to Sir John Shelley, who granted unto Thomas Shelley the next Avoidance, who was outlawed for Debt, and the Church became void, and ſo it belonged to him to preſent, and averred, that the Church lay within the Rape of Bramber; upon which Declaration Sir John Shelley confeſſed the Action, and the Biſhop demurred in Law, his Counſel conceiving that the Grant of Liberties did extend only to the Goods and Chattels of perſons outlawed only for Felony, becauſe the Clauſe concerning Outlaws was in the midſt between two Clauſes of Forfeitures for Felony, and urged the Caſe of 8 Hen. 4. 2. and 11 Hen. 6. of Grants of Goods of Felons, Ita quod ſi pro aliqua tranſgreſſione aut alio delicto pro quo catalla perdere debent, &c.

But the Court reſolved, That the Clauſe did extend to Outlaws for Debts and Treſpaſs: For Outlaws for Felony were contained under the firſt Clauſe of Felons convict, or condemned: And Felons looſing Goods by Slight, either in Deed or Law, are contained under the Words fugitivorum & in exigend' poſitorum.

So the middle Clauſe of Utlag' which ſtands perfect of it ſelf and without depending upon the other, though it be amongſt them, muſt either be conſtrued of Outlawries in Actions, or elſe muſt be Surpluſage, and of no Uſe.

Alſo being a Grant of a lower Nature, it is fitly placed; but the Caſes put by the Counſel of the Defendants, are nothing like; for the very Grants are only Goods and Chattels of Felons, which the Clauſe following under the ita quod, cannot inlarge; and Withall, Tranſgreſſio eſt nomen æquivocum; and being joined with Delictum, ſhall not be taken for a common Treſpaſs, but for an Offence.

Secondly, It was reſolved, That the Deed of Grant of the next Avoidance to Shelly, was not to be ſhewed by the Plaintiff, being in the Poſt, and not privy to the Grant in any wiſe.

Thirdly, It was reſolved, That the Advowſon had ſuch a Locality in the Rape, where the Church was, that it accrued to the Plaintiff, whereſoever the Deed of Grant was, or the Grantee himſelf at the Time of the Outlawry. 2 Le. 56.

In this Caſe, Gibſon as Parſon of the Preſentation of Sir John Shelly, pleaded another Plea, which was inſufficient, and judged againſt him. So the Plaintiff had a Writ to the Biſhop againſt them all.

(382) John London againſt the Chapter of the Collegiate Church of the Bleſſed Virgin Mary of Southwell.

Mich. 16 Jac. Rot. 1877.

Quare Imped. Nottingham. Waller. By what Words in a Leaſe an Advowſon will not paſs. Winch. Ent. 810 or 812.

JOhn London brought a Quare Imped' againſt the Chapter of the Collegiate Church of the Bleſſed Virgin Mary of Southwell of the Vicarage of Southwell, and declared that one Jones was ſeiſed of the Prebend' of Normanton, in the ſame Collegiate Church, to which the Advowſon of the ſaid Vicarage did and doth belong in Fee, and preſented, &c. And then brings down the Prebend' unto Robert Abbot Clerk, and then ſhews, that Abbot did demiſe the Prebend' ad quam, to him for Years yet indiring, and that the Church became void, and the Chapter of Southwell diſturbed him.

The Chapter pleaded, that Robert Abbot did not demiſe the Prebend' unto the Plaintiff, modo & forma prout, &c.

The Jury find, that Abbot made him two Leaſes of one Date, of divers ſeveral Parcels of the ſaid Prebend' With theſe general Words in the Concluſion of one of the Leaſes cum omnibus commoditatibus, emolumentis, proficuis & advantagiis cum pertinentiis eidem Prebend' ſpectant' ſeu aliquo modo pertinen'.

And

And then concludes, That if the Advowſon or Vicarage paſs by this Leaſe, that then Abbot did demiſe the Prebend', &c. and if not, then econtra, which
3 Car. 163. 1 Leo. 191. was a Concluſion ſomewhat imperfect, yet ſerved well enough. The Court adjudged that the Advowſon did not paſs by the Leaſe aforeſaid, and the
Goldsb. 42. Co. L. 374. b. Ante 43. Margine. ſaid Words. The Words are four: Commodities, Emoluments, Profits and Advantages, to the Prebend' belonging; all which four Words are of one Senſe and Nature, implying Things gainful, which is contrary to the Nature of an Advowſon regularly; yet an Advowſon may be yielded in Value upon a Voucher, and may be Aſſets in the Hand of an Executor. But
Poſt. 308. 3 Leo. 101. 2 Leo. 80. Words in Grants ſhall be conſtrued according to a reaſonable and eaſy Senſe, not ſtrained to Things unlikely and unuſual; and therefore 14 H. 8. 1. If a Man grant all his Woods and Trees, Apple-Trees will not paſs. And 20 Aſſ. 9. Common in Graſs will not paſs by the Words Trees, Tenements paſt' & paſtur', yet it is a Feeding and Paſturage; and 44 E. 3. 33. an Appropriation, nor the Advowſon of it, will not paſs by the Name of an Advowſon, yet an Advowſon will be contained under the Name of a Tenement. And therefore 33 E. 3. the King gave Licence to purchaſe Lands and Tenements in Mortmain to the Value of an hundred Shillings allowed for Advowſons, and the Eſſoin is de placito terræ. And 15 Eliz. Dyer 322. Advowſon paſſed by Name of all Hereditaments lying where the Church lies; but the Words here, Commodities, &c. it is to be underſtood of thoſe Things whoſe Nature is gainful and commodious as Commons of Feed, Eſtovers and the like that belong to Land, and make it more profitable and commodious; and therefore 39 H. 6. the King granted that Monks ſhould have all their Poſſeſſions of the Abbey in the Vacation for their Suſtentation; ruled, that they ſhould not have the Advowſons, becauſe no Suſtentation aroſe from them.

(383) Lamb *verſus* Thompſon.

Mich. 16 Jac. Rot. 2342.

Mich. 18. Jac. Obligat'. Suffolk, Hutt. 40. meſme ca. 1 Ro. 429. EDmund Lamb brought an Action of Debt againſt Richard Thompſon, upon an Obligation of forty Pounds; the Condition was, That if the ſaid Richard Thompſon ſhould at any Time or Times, after the making of the ſaid Obligation, be any Way or Means aiding or aſſiſting unto Thomas Elmy, or any other Perſon or Perſons, for him the ſaid Thomas Elmy, in any Action or Actions, Suits, Vexations, Troubles, Hinderances or Moleſtations, to be commenced or proſecuted againſt the ſaid Edmund Lamb, his Wife, Children and Aſſigns, that then this Obligation ſhall be void.

The Plaintiff by Replication aſſigns for Breach, That he brought an Action of Treſpaſs before that Obligation againſt the ſaid Elmy, and the Defendant Thompſon, and that he had Judgment upon it for eight Pounds Damages againſt Elmy, and two Pence Damages againſt the Defendant, and eight Pounds Coſts againſt them both; and that thereupon after the making of the Obligation, Elmy and the Defendant brought a Writ of Error, and ſo hindred him of the Execution upon his Judgment; whereupon the Defendant demurred, and it was judged for him, that it was no Breach; for though the Defendant might bind himſelf, not to bring a Writ of Error expreſly, yet upon ſuch general Words as theſe are, whereupon the Law may make Conſtruction, it ſhall never inforce it ſo, for the apparent Senſe of the Condition is, That he ſhould not maintain Elmy in any his proper Suits againſt the Plaintiff, which is juſt and reaſonable; but it hath no Reaſon, that he ſhould be barred to defend himſelf by joining with Elmy againſt unjuſt Proceeding of the Plaintiff againſt him: And therefore if the Plaintiff
2 Cr. 117, 6 Co. 25. b. after Verdict againſt Elmy and the Defendant, ſhould have releaſed, and yet have taken Judgment and Execution, the Defendant might have joined with Elmy in an Audita Querela, for it is his own Defence againſt an unjuſt Suit, and ſo is this Writ of Error.

(384) Poland *verſus* Maſon. Caſe.

Hill. 17 Jac. Rot. 1938.

POland brought an Action of the Caſe againſt Maſon, for ſaying, I charge him (meaning the Plaintiff) with Felony, for taking Money out of the Pocket of Henry Stacy: Upon not Guilty, the Verdict was found for the Plaintiff, yet the Judgment was given againſt him. The Reaſon was double; he doth not Affirm that he is a Felon, but he doth only ſay, that he doth charge him with Felony, which he may lawfully do in ſome Caſe, tho' he did not the Fact; as if a Felony were done, and the common Fame were that he did it, any one that ſuſpects him may charge him with it: The other Reaſon was, becauſe theſe Words ſingle do but ſuppoſe it Felony, and that whereby he would warrant the Words is laid down, which, for ought appeareth to the Court, might be but a Treſpaſs; and though he chargeth it to be a Felony, yet in Ambiguities the Court ſhall follow the mildeſt Senſe, as in the Caſe, he is a Thief, for he hath ſtoln my Trees: Yet there is ſtealth both in the Words, and in the Reaſon of the Words.

Parolls. Hutton, 38. meſme Ca. 1 Roll. 73. 1 Brnl. 18. 1 Ro. 43. 2 Ro. R. 342. Hutt. 38. Poſt. 326. m' c' I charge him with Felony. Latch. 175. Jones, 302. 2 Cro. 312, 315, 316. 3 Cro. 890. Cr. Car. 277. 1 Cro. 277. Pop. 210. Berl. 202. Hales pl. Cr. 91.

Ant. 77.

(385) Powel *verſus* Winde.

POwel an Attorney brought an Action upon the Caſe againſt Winde for theſe Words, I have Matter enough againſt him, for M. Hartly hath found Forgery againſt him, and can prove it againſt him. And it was judged againſt him, for there was no Certainty whereof the Forgery was.

Poſt. 326. m' c' Hutt. 41. Ant. 2. *Hartley* hath found Forgery againſt him, *&c.*

(386) Strede *verſus* Hartley. Replevin.

Tr. 18 Jac. Rot. 399.

STrede brought a Replevin againſt Hartley, for taking a Diſtreſs at Baildon, in a Place there called Steed-houſe. The Defendant made Conuſance as Bailiff unto William Haukeſworth, becauſe that Houſe was holden of him as of his Manor of Baildon; the Plaintiff ſaid, that it was out of his Fee. Whereupon Iſſue was, and the Ven. Fac. was de vicineto de Baildon, and after Verdict for the Plaintiff, Haris moved in Arreſt of Judgment, that the Ven. Fac. ſhould have been as well from the Manor as the Town: But the Court gave Judgment for the Plaintiff, becauſe it doth not appear that the Manor was larger than the Town; and ſince the Verdict paſſed, the Court ſhall not defeat it upon a Poſſibility it may be or not be, as like the Caſe of Town and Pariſh; but if the Viſne were to come from the two Towns by the Records, and were taken but from one, the Caſe were clean contrary.

Yel. 26, 182. 2 Ro. 621.

Ven. fac. whence. Ant. 64, 189. Po. 326.

2 Cro. 43, 160, 480, 599, 838. Jones, 205.

(387) Clerke *verſus* Wood. Caſe.

CLerk brought an Action of the Caſe againſt Wood, and laid, that he was ſeiſed of a Meſſuage in Fairfield, to which he had common Appendant; and ſeven Acres in F. aforeſaid, and that he had alſo a Way from his Meſſuage to the ſaid ſeven Acres in Fee aforeſaid, and by, and over it to Buntingford, and that the Defendant had plowed up the ſeven Acres, whereby he loſt both the Uſe of his Common and Way; upon Iſſue not Guilty, the Ven. fac. was from Fairfield only: and after Verdict for the Plaintiff, it was moved, that it ſhould have been from Buntingford alſo: But the Court gave Judgment for the Plaintiff; for though it is true, that if the Iſſue had been above the Preſcription, it muſt have been from both, yet the Iſſue not Guilty, reſpects chiefly the Grief, which is the Plowing up of that Part of the Way in F. which is a Treſpaſs upon the Caſe there, though the Way went no farther: So as the reſt of the Way is indeed but Inducement to the

Hutt. 39. meſme Ca. Jones, 2, Poſt. 326. m' c' Ant. 189. Yel. 164.

Viſne whence. 2 Cr. 599. 3 Cr. 426. Yel. 127, 141, 142.

Noy. 9. Yel. 127. 3 Cr. 427, 619, 854, 870.

Action, and the Way might have been laid only to and from the Houſe, and that Piece of Common, both in Fairfield.

Prohibition.

(388) William Wright Plaintiff, Gilbert Gerrard *and* Richard Hildersham Defendants.

Eſſex. Waller.

Hill. 15 Jac Rot. 1510.

1 Cr. 424. Jones 187, 373. Jon. 2. 3. 2 Cro. 607. Cr. Car. 425. Diſm's B. 17. Winch Ent 642. or 647. Stat. 27 H. 8. for Diſſolution of Monaſteries.

THe Plaintiff declares in Prohibition, that Richard Stowden, the laſt Prior of the Monaſtery of Hatfield, and his Predeceſſors were, Time out of Mind, ſeiſed as well of the Rectory of Hatfield, as of a certain Farm there called Downhall Farm, in his Demeſne as of Fee, and by reaſon thereof did enjoy the ſaid Lands diſcharged of Tythes, and then recites the Statute of 27 H. 8. for Diſſolution of Abbeys, and that the ſaid Priory was under two Hundred Pounds per Annum, and that by Vertue of that Statute King Hen. 8. was ſeiſed, ſimul & ſemel of the ſaid Parſonage and Lands diſcharged of Tythes, and that the Abbeſs of Barking was ſeiſed of the Manor of Littington, and ſhe ſo ſeiſed, November 3. 29 Hen. 8. conveyed the Manor of Littington to Hen. 8. and King Hen. 8. conveyed the ſaid Lands called Downhall Farm, and the ſaid Rectory, to the Abbeſs of Barking; by Vertue of which Convеyance ſhe was thereof ſeiſed (and then ſpeaks not of the Diſcharge of Tythes) and 14 Novemb. 31 Hen. 8. ſhe ſurrendred them again, together with the whole Monaſtery, to Hen. 8. and then recited that one only Clauſe of the Statute 31 Hen. 8. for enjoying of Abbey-Lands diſcharged of Tythes; and that by force of the Grant of the Abbeſs of Barking, and of the ſaid Statute, K. Hen. 8. was ſeiſed of the ſaid Lands diſcharged of Tythes: And he being ſo ſeiſed, granted the ſame to William Barnes, and others, and brings down the Title of the Land to one Glaſcocke, and the Plaintiff by Leaſe, and then recites the Statute of 32 H. 8. and 2 E. 6. that none ſhould be compelled to pay Tythes for Lands diſcharged of Tythes, and that though the ſaid Farm and Lands were diſcharged of Tythes, &c. that yet the Defendants ſued Glaſcocke and him for Tythes, &c. that Glaſcocke died, hanging the Suit there, and that he pleaded ut ſupra there, and yet then refuſed, &c.

Whereupon the Defendant, by Proteſtation, denying the Unity by Preſcription in the Prior of Hatfield, demurs upon the Declaration, and prays Conſultation.

The Plaintiff Demurs, and Prays, that no Conſultation be granted. It ſeems his prayer ſhould be, that the Prohibition ſhould ſtand. But either is well enough.

Queſtion of the Caſe. 1 Cr. 424.

The Caſe in ſhort is thus. The Prior of Hatfield and his Predeceſſors, Time out of Mind, were ſeiſed of the Parſonage of Hatfield, and a Farm in the ſame Pariſh, called Downhall Farm, together.

The Priory being under two Hundred Pounds per Annum, was given to the King by the Statute of 27 H. 8. the King gives the Parſonage and Farm to the Abbeſs of Barking, the Abbeſs ſurrenders all to the King. The Queſtion is, whether the King, and thoſe that Claim under him, ſhall hold this Farm diſcharged of Tythes, by Force of the perpetual Unity.

Judgment.

And it was adjudged againſt the Plaintiff, and a Conſultation granted, by the uniform Conſent of all the Judges.

This Caſe doth conſiſt of two great Points, as they ariſe in order of Time.

1 Great Point.

The firſt great Point is, Whether as this Caſe is, and as it is pleaded, this Land ought to be diſcharged of Tythes, though it had come to the King only by the Statute of 31 Hen. 8. that is to ſay, that it had never come to the Prioreſs of Barking, by Reaſon whereof, and of her Surrender, it was veſted in the King, by the Statute of 31 Hen. 8.

And I am of Opinion, that in that Caſe they had not been diſcharged.

The

The ſecond great Point is, Whether upon the whole Matter, and the Conſideration of a double Means whereby it came to the King, viz. by 27 H. 8. from Hatfield, and by 31 H. 8. from Barking, and upon Conſideration of both theſe Statutes, this Land ought to be diſcharged by this Unity of Tythes. And I am of Opinion, that it is not diſcharged. 2 Great Point.

Now the firſt great Point I do ſubdivide into four petty Points, which do all conclude to the Judgment of the firſt great Point.

Firſt, whether the Appropriation in this Caſe came to the King, and remained in him a Parſonage appropriated by force of the Statute of 27 H. 8. only, as well as the like Appropriations did by the other Statute of 31 H. 8.

And I am of Opinion, that it came to the King Appropriate, and ſo remained in him by force of that Statute only: For if that were not ſo, the Appropriation had been diſſolved ipſo facto, by the Diſſolution of that Abbey, and ſo had not come to the King, nor the Abbeſs of Barking from the King, nor from her again to the King. 1 Petty Point.

The ſecond Point, Whether Unity of Parſonage appropriate Land, and having been in a ſmall Abbey Time out of Mind (as in this Caſe it was) and ſo coming to the King by the Statute of 27 H. 8. only, doth work a Diſcharge of Payment of Tythes. 2 Petty Point.

And I am of Opinion that it will not. Wherein we will ſpeak of Diſcharges of Tythes in general, within that Law of 27 Hen. 8. which ſtand clear with that Law, and which not.

The third Point, Whether the Clauſe of Diſcharge of Payment of Tythes contained in the Statute 31 H. 8. can be extended to the ſmall Abbeys, and their Lands which came to the King by the Statute of 27 H. 8. only, or not. 3 Petty Point.

And I am of Opinion that it cannot extend to them.

The fourth Point, as this Caſe is pleaded, that is to ſay, repeating only the Clauſe of the Statute 31 H. 8. that gives the Diſcharge of Payment of Tythes, without mentioning either their Preamble, or any of the other Clauſes that refer and reſtrain that Statute to thoſe Abbeys that came to the King after the fourth of February, 27 H. 8. which excludes this Abbey. So that now this Clauſe may ſeem as general to the Court in Meaning, as it is in Letter, ſo that it may comprehend as well thoſe Abbeys that came by the Statute of 27 H. 8. and ſo before the fourth of February, &c. as well as after, whether now the Court ſhall judge upon that Clauſe of the Statute of 31 H. 8. only without taking Knowledge of the other Parts of the ſaid Statute, which gives the Clauſe another Conſtruction, than by it ſelf alone it ſhould have. 4 Petty Point Mo. 420.

And I am of Opinion, that the Court ſhall take Notice of the whole Statute (though Part be omitted material) and judge accordingly. And that therefore if it had not come by Barking, and ſo within the Statute of 31 Hen. 8. the Court could not relieve it by this Clauſe, as general to all Abbeys, by the Advantage of the Generality of the Clauſe, (as it is delivered in Pleading) ſo this Point is handled, as though it had not appeared to come to the King by Barking, ſcilicet by 31 H. 8. but only by 27 H. 8. becauſe as the Clauſe is general, it ſeems to benefit both alike, as well thoſe that come by the 27 as 31 Hen. 8. though in Truth, and upon the Conſideration of the whole Statute of 31 Hen. 8. it doth not ſo.

Now to the firſt Point, or Queſtion of the firſt great Point.

It is true, the Appropriations are not regularly grantable over, neither can they endure longer than the Bodies, whereunto they were firſt Appropriate; whereof the Reaſons are, becauſe it carries not only the Glebe and Tythes, (which they might grant away) but it doth alſo give them the Spiritual Function, and doth make the Parſons of the Church, and doth ſupply Inſtitution and Induction, which being the higheſt Parts of Truſt, cannot be eſtranged, and therefore the Inſtrument of Appropriation runs in theſe Words, that they and their Succeſſors (not their Aſſigns) ſhall be Parſons, or by Periphraſis hold the Church in proper Uſe. Now yet, by Parliament Appropriation may be tranſlated. But the Queſtion is, whether To the firſt great Point, the firſt petty Queſtion thereof. Plo. 479. a. Ant. 228. Plo. 500. b.

the Act of 27 gave them unto the King in Stat. of Appꝛopꝛiations. Againſt which it is objected, that the Statute hath not the Woꝛd of Appꝛopꝛiation; which in a Thing of ſo ſingular Nature, and ſo fixt to one certain Body, in point of Care and Function, and ſhall not be taken within the Meaning of the Law, without ſome perfect and pꝛoper Woꝛd to carry it.

Secondly, it is objected, that the Opinon in the Biſhop of Canterbury's Caſe, Co. lib. 2. fo. 47. b. that all Impꝛopꝛiations had been diſſolved upon 31 Hen. 8. if the Clauſe of Diſcharge of that Statute had not been. To this an Anſwer hath been endeavoured, that the Statute gives to the King their Tythes and their Land which carry their Glebes, whis is the whole Parſonage ſay they: But I allow not this Anſwer. Foꝛ theſe Woꝛds may well be taken foꝛ Common Lands, and Tythes, foꝛ Poꝛtions of Tythes divided from the Paſtoꝛal Charge: Foꝛ it ſhall never be underſtood that the Appꝛopꝛiation ſhould be diſſolved, and the Church made Pꝛeſentative, and yet by the ſame Statute, both Glebes and Tythes ſhould be taken from the Church and and given to the King. Foꝛ this were as much as is ſaid of Julian the Apoſtate, that he did occidere, non Presbyteros, ſed Presbyterium.

2 Cr. 608. Ant. 304. But I hold, that Appꝛopꝛiations are well given to the King; and that by a Woꝛd pꝛoper enough. Foꝛ the Statute gives (Inter alia) the Churches, Chapels, Advowſons, and Patronages of ſuch Monaſteries, which muſt be underſtood their Churches, as they were in them either Appꝛopꝛiate where they were ſo, oꝛ their Advowſons where they were not; otherwiſe it were a meer Tautologiſm, Fitzh. N. Br. 32 G. Eccleſia & Rectoria, are Synonyma, and Woꝛds of appꝛopꝛiating, are that they may hold Eccleſiam & Rectoriam in proprios uſus, as Greendon's Caſe is. Again, this Statute gives all thoſe Monaſteries Whereof the Poſſeſſion did not exceed two Hundꝛed Pounds per Annum, ſo whatſoever made to that pearly Revenue Was meant to be given to the King. And it was notoꝛious, that a great Part of their pearly Pꝛofits, did conſiſt in Appꝛopꝛiations; foꝛ it Was eaſie foꝛ them to get Advowſons, and as eaſie to get them Appꝛopꝛiate.

Alſo it Was the clear Purpoſe of the Statute to give the King all that thoſe Abbeys had, and tꝛeꝛefoꝛe the Saving doth exclude the Founders, Patrons, Donoꝛs, &c. But if the Appꝛopꝛiation ſhould be diſſolved, the Giver ſhould be reſtoꝛed to his Patronage; and Pridle's Caſe, Co. lib. 11. 13. a. ſays, that Appꝛopꝛiations in Reputation paſſed both by the Statutes of 27 & 31 Hen. 8.

2 Cr. 608. Ant. 148. Alſo note, that the Statute 31 Hen. 8. recites the Surrender befoꝛe made of divers Abbeys, and & inter alia, ſo all their Churches, Chapels, Advowſons, Patronages (and names not Appꝛopꝛiations there) but in the Purview gives Appꝛopꝛiations by Name, in majorem Cautelam, as being granted befoꝛe in true Meaning, though it is true, that ſuch Gꝛants oꝛ Surrenders without the Statute, would not have carried Appꝛopꝛiations. Theꝛefoꝛe by the Woꝛd Churches, the Appꝛopꝛiations were conceived to be granted, and ſo ſettled by the Statute; and theꝛefoꝛe the pleading is, Virtute ſurſum redditionis præd. ac vigore Stat. &c. Foꝛ the Statute gives not in Intent, but doth veſt only, ſaving this ſpecial Caſe, which I note, becauſe it is a ſingular Caſe.

Ant. 304. Raſt. Ent. 488.

And upon this I obſerve further, that all the Appꝛopꝛiations of Abbeys that were ſurrendꝛed between Twenty ſeven, and Thirty one H. 8. were ipſo facto diſſolved, with the Diſſolution of the Coꝛpoꝛation, and Were pꝛeſentable and might have new Incumbents. But as ſoon as the Statute of 31 H. 8. came the Appꝛopꝛiations were reſtoꝛed and given to the King, and the Incumbents outed.

And touching the Opinion befoꝛe mentioned, I wonder from whence it ſpꝛang; foꝛ ſince the Body of the Statute of 31 Hen. 8. gives Appꝛopꝛiations by Name, what needs the other Clauſe foꝛ that Purpoſe? And if a By-Clauſe can do it, why ſhould not the main Body? So that Conceit is vain.

Second petty Queſtion of the firſt great Point. Now to the ſecond Point, oꝛ Queſtion, of the firſt great Point. This Statute hath no Clauſe foꝛ Diſcharge of Payment of Tythes, as that of Thirty one

one of Hen. 8. hath, neither any thing to give Colour to it, other than the Clauſe, that the King ſhall have the Lands, &c. in as large and ample manner as the Abbots held the ſame.

Now there are five Ways, or Means, whereby Abbey Lands are holden diſcharged of Tythes, that is to ſay, Compoſition, Bull or Canon, Order, Preſcription of Diſcharge, and Unity of Poſſeſſion of Parſonage and Land Time out of Mind, together with Payment of Tythes. Of theſe five, the four firſt Diſcharges the Abbots themſelves had, or might have them, but the fifth was no Diſcharge in the Hands of the Abbeys, but it made a Diſcharge of Payment of Tythes to the King, and thoſe that claim under him by the favourable Conſtruction of that Clauſe of 31 Hen. 8. for ſo much as that Clauſe extends to, which Opinion was long controverted, being confeſſed of all Hands, that it was no full and perfect Diſcharge in Law: So then it follows, that theſe Lands can receive no good by this Unity, unleſs they be within the Relief of that Clauſe of 31 whereof we ſhall ſpeak hereafter.

2 Co. 47. b. 11 Co. 14. a. Jones 3. 2 Cr. 453, 608.

Ant. 298.

Now of the other four, the firſt three, that is, Compoſition, Bull or Canon, and Order were granted and annexed unto the Body of the Monaſtery, and were granted unto them as Perſonal Privileges, in reſpect of their Spiritual Abilities or Funcions, and their Capacity of Tythes, and Diſcharge of Tythes for that Cauſe: And therefore theſe had all vaniſhed and expired with the Diſſolution of the Body, if they had not been preſerved to the King and his Patentees by that Clauſe. But Diſcharge of Tythes of the Lands of Monaſteries by Preſcription is of another Nature; for having been always (as Preſcription preſumes) in Spiritual Hands, the Law judgeth that it was never charged with Tythe; as the Pleading is, that the Lands were immunes a ſolutione decimarum negative, non privative, ſcilicet, uncharged, not diſcharged, as if they had been once chargeable: The Reaſon whereof was, that being Spiritual Perſons, they were able to miniſter to themſelves Spiritual Rights, and therefore performing Officium they might retain Beneficium: And this Non-charge ſtanding upon Preſcription was inherent to the Land, not as a Thing given, but as a non ens, Lands that never yielded Tythe, and Land of the little Monaſteries ſo free of Tythes, the King by the Statute 27 Hen. 8. and his Patentees were to hold free, not by Reaſon of any Privilege which did need to be preſerved by any Statute, but ever by the Grant of the Land by any kind of Conveyance.

Poſt. 311. 1 Cr. 423. Mo. 913. Syd. 321.

1 Cr. 423.

And therefore though I ſaid, that Diſcharge of Bull or Compoſition was to die with the Corporation, yet if it were once run out Time out of Mind, it was then to be pleaded and uſed as a Non-charge, by Preſcription, which was a Title of Diſcharge by the Temporal Law, and if it were impugned, it was to be drawn by Prohibition to a Trial at the Common Law, and this without the Help of any Statute. And therefore in the Biſhop of Winchester's Caſe it was reſolved, that the Biſhop holding Lands of his Biſhoprick, diſcharged of Tythes by Preſcription, his Farmer being a Layman, ſhall have a Prohibition for his Diſcharge; and ſo ſhall the Biſhop have himſelf though he be a Spiritual Perſon. And yet Biſhopricks, and their Lands, are in point of Diſcharge of Tythes at the Common Law, out of all Statutes: So then, the Concluſion is that of the five ways of Diſcharge of Tythes, three, that is to ſay, Order, Compoſition, Bull or Canon, are preſerved and kept alive by the Clauſe of Diſcharge in the Statute of 31 Hen. 8. and a fourth, which is Unity, is created by that Branch, and the fifth, which is Preſcription, ſtands by the Common Law, and hath no need nor uſe of any Statute.

Jones 3. 11 Co. 14. b Jon. 368, 387. Syd. 320. 2 Co. 45. a.

Ant. 42. 1 Cro. 422, 423.

Now to the third Queſtion of the firſt great Point, the Lands of the ſmall Abbeys coming to the King by the Statute, made at the Parliament holden February 4. 27 Hen. 8. cannot be aided by the Diſcharge of Tythes in the Statute of 31 Hen. 8. for firſt, all the ſmall Abbeys ſhall be ſaid to the King the firſt Day of the Parliament, ſcilicet, Feb. 4. according to the Rule of 33 Hen. 8. becauſe Acts take effect the firſt Day of the Parliament.

The third petty Queſtion of the firſt great Point. 1 Cro. 425. 2 Cro. 608.

Ant. 222.

Then

Then take the Whole Statute of 31 Hen. 8. and you ſhall find, that the Monaſteries therein mentioned, are divided, both in the Preamble, Purviews and other Branches, into theſe that come to the King ſince (that is after) 4 Feb. 27 H. 8. as it were de induſtria to exclude the little Monaſteries given by that Statute, and that thoſe ſhould come to the King after the Statute of 31 Hen. 8.

And ſo he proceeds in that Clauſe, that puts them in the Survey of the Court of Augmentations, and in the other Clauſes alwayes uſes the ſaid late Abbeys which reſtrains them; and even in this Clauſe of Diſcharge, though there is in the Body any Monaſteries indefinite, yet the Preamble of that Clauſe recites where divers of the ſaid Abbeys enjoy their Lands diſcharged of Payment of Tythes: Be it therefore, &c. that the King, &c. ſhall hold diſcharged of Tythes as the ſaid late Abbots, &c. did, for the Preamble is plainly reſtrained to the Abbeys in that Law and the Purview (be it therefore) depends upon the Reaſon of the Preamble, and the ſaid Abbots in the Concluſion reduceth it to this, that the Land of any Monaſteries ſhall be holden diſcharged as the ſaid Abbots (ſcilicet, mentioned in this Law) held them; and this Caſe is in Effect judged in the Biſhop of Canterbury's Caſe, where it is judged, that Lands of Chantery coming to the Crown by the Statute of 1 E. 6. are not within the Relief of this Clauſe for three Reaſons.

2 Co. 47 a.

Firſt, that a Branch of a Statute, ſhall not be taken larger than the Body.

Secondly, that Chanteries being in the King by one Act of Parliament, ſhall not be judged in him by another.

Thirdly, that the Form of Pleading was never ſo, the King was ſeiſed by force of both Acts; all which fits this Caſe. And yet more (as hath been ſaid) the Lands of 27. H. 8. are by expreſs Terms excluded out of the Statute of 31, which is not ſo in Canterbury's Caſe, and ſo 10 Eliz. Dyer 341. for the Point of Leaſes.

Fourth petty Queſtion of the firſt great Point. 2 Cr. 159.

Now to the fourth Queſtion of the firſt great Point, if this had been a particular Statute, whereof the Court could take no other knowledge but as it was pleaded, this Clauſe muſt have been taken generally for all Monaſtery-lands; becauſe there was nothing in the Plea that reſtrains the Generality of the Words, and the Defendant might at his Choice, either plead that there was no ſuch Act of Parliament, or elſe might ſhew the farther Additions, and that in another Term; as if a Man ſhould plead a Deviſe to him and his Heirs, and the Deviſe indeed is ſo in Words, but then goes on, and adds, that if he die without Iſſue, it ſhall remain over; the Adverſary may either traverſe the Deviſe generally, or ſhew the Addition; but being a general Law, the Court may take knowledge of the whole. But then though it be a general Law, if it be miſ-recited the Court ſhall take knowledge of it, as it is reſolved in Partridge and Croker's Caſe, Plow. 84. and Lord Cromwel's Caſe, Cook, lib. 4. fol. 14. But note, in the firſt of thoſe Caſes, the Statute was pleaded made at a Parliament, when there was no ſuch Parliament; and in the other the Subſtance of the Statute was miſ-recited, ſo both appeared to the Court False. But in this Caſe there is nothing pleaded False, but only there is an Omiſſion of ſome Part of the Statute that may give another Senſe to this Clauſe.

Plo. 131. a.

Yelv. 106.]

Now then this being a general Law, there was no need to plead it, nor any Part of it, no more then when you plead a Feoffment to uſes, to ſay, that virtute cujus, & vigore Statuti de uſibus, though the Uſe of Pleading be ſo; for when you have laid down the Caſe, the Court in general Statutes makes Application of the Law without your Help. So then, ſince he hath in this Caſe recited ſome Part of the Law, which he needed not have done, and that truly, you ſhall not require at his Hands to repeat either the whole Law, Preamble and all, or elſe at his Peril to cull out all Parts that are material to give Conſtruction to that Part that he pleads; for that is the Office of the Court, and not of the Party.

The ſecond great Point.

Now to the ſecond great Point of the Caſe, the Judges muſt be very Conſiderate, not to extend the Diſcharge of Tythes, by way of Unity, beyond the Bounds whereof it hath gotten Poſſeſſion, for divers Reaſons.

Firſt,

Firſt, it is no Friend to Religion; for it takes away the Nouriſhment and Reward of Learning, and Induſtry of Church-men.

Secondly, it is againſt Common Right, and the Common Law of ENGLAND; for according to them it is no Diſcharge.

Thirdly, it is an Accroachment, even beyond the uſurped Authority of the See of Rome, by which it was no Diſcharge.

Fourthly, it was ſuch a Bear's Whelp, as it was an Age before it would be brought in any Shape, and yet when all was done, it was caſt into a Form of Pleading, which departs from the Rules of all Art of Reaſoning: For it is pleaded thus for Example. The Prior of Hatfield, &c. Time out of Mind, was ſeiſed of the Parſonage and Land, ſimul & ſemel, & ratione inde held the Land diſcharged, &c. And yet you may not deny the Argument, which muſt be; that Unity by Preſcription diſchargeth, though it be confeſſed to be falſe. And if you ſuppoſe the Major, and turn it into a Syllogiſm, you are not allowed to deny it as to demur in Law upon it, yet whereſoever ſuch an Unity is, with a clear Non-payment of Tythes, Time out of Mind, in a Body Spiritual, capable of a Non-charge, it might have been laid as an abſolute Diſcharge upon better Reaſon directly, than to lay it upon the Unity; for the Preſumption of a perfect Diſcharge, in that Caſe was not doubtful; for in Pridle's Caſe, Co. lib. 11. fol. 14. it is truly ſaid, that an Unity and a perfect Diſcharge by Preſcription may ſtand together. 3 Cr. 206.

Now then it is agreed, that where the Unity is ſuch as is allowed for Diſcharge, it is not ſo allowed for it ſelf, and of its own Strength, but in Contemplation of a true Diſcharge, which, in ſuch Confuſion of Poſſeſſions and Privileges of all Natures, may well be conceived, though it cannot be ſhewed. Now that Preſumption fails in this Caſe, for where there are four Ways, as hath been ſaid, to diſcharge Abbey Lands of Tythes; that is to ſay, Order, Compoſition, Bull or Canon, and Preſcription; all theſe may be preſumed to maintain the Diſcharge by Unity, where the ſame Body of the Abbey continued ſeiſed, both of the Parſonage and the Land, from beyond Memory, 'till the Statute of 31 H. 8. for then that Statute, and the Clauſe of Diſcharge thereof did attach upon it with full Advantage. But in this Caſe, which is a Novelty, three of theſe Preſumptions fail with the Prior of Hatfield, as hath been ſaid, that in Order, Compoſition, and Bull or Canon. Ant. 309.

Now if it be ſaid, that if the Abbey of Hatfield were diſcharged by Preſcription, that that remains. I anſwer, that if it be ſo taken, it makes expreſly againſt the Plaintiff, for that Diſcharge is ſufficient of it ſelf, according to the Courſe of Common Law, and hath no need of the Help of any Statute, as hath been ſaid, and therefore cannot be admitted, in Underſtanding to maintain an Unity, which hath no Force but by the Statute of 31. for Fiction is never admitted where Truth may work, as where Ceſtuy que uſe, and his Feoffee join in a Feoffment, it ſhall be the Feoffment of the Feoffee. So where in Pridle's Caſe it hath been ſaid, that an effectual Unity muſt have four Qualities; that is to ſay, it muſt be perpetua, æqualis, legitima, & libera; you muſt add unto it a fifth, that is, it muſt continue in the ſame Body, or elſe the Preſumption of true Diſcharge ceaſing, loſeth his Force. And I am of Opinion, that if in this Caſe the Plaintiff ſhould lay the Diſcharge by Preſcription, that the Defendant might avoid it by ſhewing, that the Abbey was diſcharged by Order, Compoſition, or Bull, within the Time of Memory, or at leaſt it were a great Evidence for him. Ant. 160. 11 Co. 14. b. 2 Cr. 433.

Kibbee

(389) Kibbet *verſus* Lee.

Tr. 17 Jac. Rot. 1880.

Midd. Brownlow. 27 H. 8. cap. 10. Winch. 83. Poſt. 349.

THomas Kibbet brought an Ejectione firmæ againſt George Lee for certain Lands in Huntington, of the Demiſe of Thomas Lee. Upon Iſſue not Guilty, the Jury found that George Lee, Father of the Leſſor and of the Defendant, did by Indenture covenant to ſtand ſeiſed of the Lands in Queſtion, to the Uſe of himſelf for Life, and after his Deceaſe to the Uſe of George Lee his Son and Heir, which is now the Defendant, and the Heirs of his Body, the Remainder to his own right Heirs. Provided neverleſs, that if George the Father, ſhould at any Time during his Life, be minded upon any Occaſion to make void, or change the Uſes, that then it ſhould be lawful for him, being in perfect Health and Memory, by Writing under his Hand and Seal, and by him delivered in the Preſence of three credible Witneſſes, to declare that his Will and Pleaſure is, that the ſaid Uſes, or any of them ſhould be altered or made void, and that then and from thenceforth the ſaid Uſes ſhall be void, and the ſaid George the Father, and all other, ſhall ſtand ſeiſed to ſuch Uſes as by ſuch Writing ſhall be limited. And then they find, that George the Father made his laſt Will in Writing, under his Hand and Seal, and thereby did deviſe the ſaid Tenements to Thomas Lee the Leſſor, and the Heirs of his Body, and for want of ſuch Iſſue, to his Son George in Tail, the Remainder to his Daughter in Fee, and that the ſame laſt Will was ſealed and delivered in the Preſence of four (naming them) being credible Witneſſes, and then George Lee the Father died, and Thomas Lee the younger Son entered, and made the Leaſe, upon whom the Defendant George Lee entered, and ejected him, Et ſi, &c. And hereupon Judgment was given for the Plaintiff, by my ſelf, Warburton, and Winch, Hutton only differing. The ſole main Queſtion being, whether a Revocation actual, or an Act implying ſo much, may be made by Will, by Force, and within the Meaning of this Proviſo.

Judgment.

1 Cr. 376. The ſole main Queſtion.

Whether an Actual Revocation may be made by the aforeſaid Proviſo. Dy. 314. p. 97.

And it was agreed, firſt, that though the Verdict did not find that George the Father was in perfect Health and Memory, yet that was well enough; for it ſhall be preſumed, except the contrary be ſhewed. And ſo for the Preſence of ſufficient and credible Perſons. Otherwiſe if it were in the Preſence of ſufficient Subſidy Men.

10 Co. 143. b. 144. 1 Cr. 376.

Next it was agreed, that all Forms and Circumſtances preſcribed muſt be obſerved, as here it muſt be by Writing, ſigned, ſealed and delivered in the Preſence of Witneſſes ut ſupra, which though they be not all requiſite in a Will, as it is a Will, yet as it is a Revocation within this Proviſo, it muſt have them. Scroop's Caſe.

Now though this be true, it is to be underſtood of Forms and Circumſtances that are expreſſed, and not imagined.

Now then here the Will is a Writing under Hand Seal, and delivered in the Preſence, &c. ſo all the expreſs Circumſtances are obſerved.

Againſt which it was ſaid by my Brother Hutton, that it is to be underſtood of a Deed, according to vulgar Speech, and the rather, becauſe in ſuch Clauſes the laſt Will is eſpecially mentioned.

And laſtly, that the Clauſe is, that from henceforth, that is (ſay they) from the ſealing and delivering, the old Uſes ſhall be void, which cannot be in Caſe of a Will, which is ever revocable, and takes no Effect 'till Death, nor in this Caſe, which was ſo far agreed.

But it was anſwered by the Court, and ſo reſolved, though Revocations muſt obſerve the Circumſtances that the Owner impoſeth upon himſelf, as hath been ſaid, yet no more ſhall be impoſed upon him, but his Power ſhall be taken favourably as agreeable to Nature, that every Man have free Power over his own, which is the Reaſon that the latter Act, that cannot

Co. L. 237. a.

ſtand with the former Uſes, is conſtrued a Revocation, though according to the expreſs Word and vulgar Senſe it is none. Scroope's and Fitz Williams Caſe. Alſo where a Condition diſpenſed or extinct in Part, extinguiſhes wholly, as being odious in Law, the Caſe of Revocation is clean contrary; for if the Power extend to 100 Acres, and I make a Feoffment of 10. I may nevertheleſs revoke for the reſt. So the Power of Revocation is to be taken liberally, and the Execution of it favourably. Now then for the Clauſes [Then and henceforth] they are Surpluſage, and of no Force. For the Power of Revocation is perfect and compleat before they come to thoſe Words, in theſe Words, [that if it be his Pleaſure to revoke them, he may by his Writing, &c. declare them void] and then Words needleſs ſhall not impeach a Clauſe certain and perfect without them. And yet further, being truly conſidered, there is no Repugnancy in them; for my Meaning is, that he ſhall have Power to declare them void according to his Pleaſure, that is, according to the Nature of his Declaration in Law, which in Caſe of a Will is from his Death, or according as he ſhall expreſly appoint the Time. And therefore if in this Caſe George Lee the Father had made a ſimple Writing of Declaration, and not in the Manner of a Deed, to any certain Perſon, that his Uſes ſhall be void, and had ſigned, ſealed, and delivered it in the Preſence of three credible Witneſſes, and had either in the Body of the Deed, or verbally declared, that it ſhould take Effect upon an Hundred Pounds paid, or at his Death, and not before; that this Revocation ſhould be good, and yet ſhall not take Effect from the Making but from the Time appointed, within theſe Words: [Then and from henceforth] whereof it follows, that the former Eſtates being revoked, the Will is good for the whole, working as a Will, which maintains the Judgment. But if the Land had been holden by Knight-Service, and the Deviſe to a Stranger, it could have carried but two Parts as a Will, and by Force of the Deed of the Covenants it could carry nothing to a Stranger; and if the Land had been ſo holden and deviſed to the Son, as it is here, it can carry but two Parts as a Will, and I doubt, it could not have carried all as a Declaration of new Uſes upon the Power of the Covenant; for ſince this Deviſe (if it ſhould work ſo) cannot take Effect during the Life of the Deviſor and Covenanter, it amounts to no more, than as if a Man ſhould covenant, that after his Death his Heir ſhould ſtand ſeiſed to the Uſe of his younger Son, which I hold to be void.

1 Co. 173. b. 6 Co. 32. a. 10 Co. 144. a.

11 Co. 173. b. Co. L. 237. a.

6 Co. 18. a.

Cr. El. 232. Swinb. 329.

(390) Windſmore *verſus* Hobart. Ejection.

B. R. Tr. 27 Eliz. Rot. 850.

THomas Windſmore, Leſſee of Edward Long, Plaintiff, and Nicholas Hobart Defendant, in Ejectione firmæ, for Land in Polſholt, in Com. Wilts, Iſſue not Guilty; it was found by a Special Verdict, that William Lord Sturton was ſeiſed in Fee, and that 24 Maii, 8 H. 8. Per quoddam ſcriptum ſuum indentatum, ſigillo ſuo ſigillatum, dimiſit cuidam Thomæ Hobart tenementa præd. habend. eidem Thomæ & prafato Nicolao Hobart, ac quibuſdam Johanni Hobart & Henrico Hobart filiis prædict. Thomæ pro termino vitæ eorum & alterius eorum ſucceſſive, diutius viventium. William Lord Sturton granted the Reverſion to Thomas Long and his Heirs, who deviſed the Reverſion to Edward Long, the Leſſor in Tail, and died; Thomas Hobart and Henry Hobart died, and Nicholas and John ſurvived, and the Leſſor entered, and made the Leaſe to the Plaintiff, and the Defendant entered.

Hutt. 87, 88. Meſme Ca. Godb. 51. Ow. K. 38. Cr. El. 57. 2 Cr. 164. Ow. 38. Jon. 307, 310. Mo. 398. 2 Le. 1. Poſt. 314. Co. L. 7. a. 54. b. Yel. 9.

And in this Caſe, Judgment was given for the Plaintiff, after long Debate, and upon great Conſideration, whereof the Reaſons were; firſt, that none could take by the Deed immediately, but Thomas Hobart, becauſe he was only Party to the Deed, and the reſt not named, but by the Habend. then they cannot take but by the way of Rem. which cannot be joint, becauſe of the Words Succeſſive, &c. And in Succeſſion they cannot take, for the Uncertainty who ſhall begin, and who ſhall follow, which in the Caſe, 20 El. Dyer 163. is aſcertained by the Clauſe Succeſſive ſicut nominantur in Charta.

Judgment. Ant. 172. Co. L. 25. b. 2 Ro. 67, 68. 3 Cro. 58. 2 Leo. 1. 4 Le. 296. Plowd. 34. b. Accord. Vaugh. 26. Cr. Jac. 372. Vaugh. 264. Dy. 361. a. Mo. 637. Po. 314, 315. Plowd. 32.

Error.

(391) Greenwood *verſus* Tyler.

Tr. 16 Jac. B. R. Rot. 1089.

Palm. 29. 2 Cro. 563. m' 2 Ro. R. 366. 32 H. 8. cap. 28. Ant. 313.

NOw this Term, Mich. 18 Jacobi, **by a Writ of Error out of the King's Bench, came this Cauſe before us.** Robert Greenwood **brought an** Ejectione Firmæ **againſt** John Tyler, **of Lands in** Box **in the ſaid County; and upon Iſſue not Guilty, a ſpecial Verdict was found,** Que Anthonie Long & Alice ſa femme fueront ſeiſi in fee, in droit Alice del dits tenements in que &c. & ſic ſeiſit. 20 Aug. Anno 2 E. 6. un Indenture fuit feit enter le dit Anthony Long, & Alice ſa femme del un part & un John Fiſher del auter part per que les dits Anthony Long & Alice ſa femme demiſe & leaſe al Farme per Indenture al dit John Fiſher & Anne ſa femme & Johanne lour file les dits tenements in le Count mentioned. Habend. les dits tenements al John Fiſher & Anne ſa femme & Johan lour file & eorum diutius viven. ſucceſſive a feſto S. Michaelis Archangeli, donque prochein enſuant le date del dit Indenture uſque le fine & terme de lour vies naturall, rendant proinde annuatim durant. vitis ſuis ut prædict. eſt le yearly rent de 13 s. 4 d. oveſque un harriot de lour beſt animal poſt eorum deceſſum ſive exitum, Anglice **going out** cujuſlibet eorum: ove Covenant de part John Fiſher & ſa femme & Johanne lour file de payer touts **free Rents** & autres **Charges and Duties** iſſuant hors de ceſte terre durant lour vies ut profertur apres le feaſt de S. Michael avant dit, & dit Anthony Long, & Alice ſa femme **delivered Seiſin** in perſon al dit John & Anne ſa femme & Johanne lour file ſolonque le forme & effect del dit. Indenture. Anthony Long, moruſt & Apres Alice ſa dit femme **receive** le **Rent** del dit John Fiſher, & puis ceo les dits John Fiſher & Anne ſa femme moruſt, & Johanne lour file enter; apres que le dit Alice puis ſa Acceptance del dit rent enfeoffa Henry Long **in Fee** ſouth que le Defendant **Claim.** Et la dit Johanne la file que eſt unc. in vie priſt. a Baron un Anthony Tyler & ils leſſant al dit Robert Greenwood prout **in the** count del Ejectione Firmæ per que le dit Robert Greenwood fuit poſſeſſe tanque fuit Eject per le dit John Tyler ſurque fuit adjudge in banc le Roy pur le dit Robert Greenwood le Plaintiff in le Ejectione Firmæ & ſur ceo de Defendant John Tyler port bre. de error.

En bank le Roy ſur grand debate de le cauſe fuerunt ceux points reſolves com fuit report a nous.

1. Attorney, or the Party, makes Livery differing from the Deed 2 Cr. 563. Cr. Car. 95. 2 Ro. 828. Hetl. 20, 21. 1 Cr. 22, 23, 388.

1. Que le livery & ſeiſin fait per Anthony Long & ſa femme in perſon puis le Feaſt de S. Michael ſecundum formam Chartæ fuit bon Auterment uſt eſte ſi le livery de ſeiſin uſt eé fait per Attorne ſolonque le Caſe de Buckler & Harvey 2 Reports fol. 55. ou devant le Feaſt.

2.
2 Cr. 153, 564.

2. Que Anne femme de John Fiſher & Johanne lour file ne puiſſoit prender joynt eſtate ove John Fiſher per le dit Indenture de Leaſe, eoque le dit Anne & Johanne ne feur. parties al dit Indenture ſolonque le caſe de Winſmore & Hobart donque cited.

3.
3 Cr. 38. 1 Ro. R. 356.

3. Et que Johan Fiſher ne prendra aſcun greinder eſtate que pur ſa vie demeſne, & nient per les vies de luy meſme, Anne ſa femme & Johanne lour file eoque ils deux fuer. intend de prender eſtate al eux meſmes & pur ceo lour noſmes ou vies ne ferr. limitation ou increaſe del eſtate del John Fiſher contra al intention del fait.

4.
3 Cr. 564.

4. Et tamen le fait in les premiſes & in le habend. ne ſerra auterment void quoad le dit Anne & Johanne mes que le fait al eux donera eſtates en Remainder perforce del parol (ſucceſſive) limit al eux in le habend. devant le eſtate pur lour 3. vies en ceo mention. Iſſuit que le ſucceſſive la va a diſtinguiſh lour ſeveral eſtates & ſucceſſive poſſeſſion, l'un puis l'auter. ſucceſſive, ſolonque le Caſe 20 Eliz. fo. 361. Dyer.

Meſme Ca. Hut. 87. m' c' Dy. 361. a. 2 Cr. 564. 2 Leo. 1. Vaugh. 261. 3 Cr. 58. Ant. 313. Ow. 38. Godb. 51.

Et en ceo de varier del le ſucceſſive in Winſmore & Hobart's **Caſe**, eo que la landenture fuit fait inter William **Lord** Sturton de l'un part & Tho. Hobart del auter part, & pur ceo le dit it William **Lord** Sturton leſſa al dit. Tho. Hobard habend. al. dit

dit Tho. Hobbard, & Nicholas & John & Henry Hobbard, pro termino vitæ eorum & alterius eorum ſucceſſive diutius viventis.

Pur que la le ſucceſſive apres les joynt vies limit nè extend a lour perſons, mes le limitation (de ſucceſſive diutius viven.) apres joynt eſtates pur vies limit ore mre. que l'eſtate continue ſi longe come aſcun de eux vive & nemy pur divider les eſtates, mes in le principal cas icy le limitation eſt habend el eux 3. noſmant eux & eorum diutius viven. ſucceſſive que extend al lour perſons pur terme de lour vies: Iſſint le ſucceſſive eſteant deveant le limitation de aſcun eſtate iſſuit eſt placed pur divider l'eſtate. 2 Cr. 565.

Ideo in le Caſe de Winſmore ceo ne fait lour eſtate ſeveral quia neſt limit al ceo, mes autrement ſerra en ceſt Caſe en variance potius que ceo ſerra al eux un void limitation ſolonque l'opinion de Juſtice Sanders in Coltheiſts Caſe, Com fo. 29. ſur le livre de 17 E. 3. fo. 29. & 18 E. 3. fo. 59. & 39 Aſſ. plac. 20. on le heyre prieſt per voy de Rem. quia impoſſible ſur le fait de prender eſtate in poſſeſſion.

But in Debate of this Caſe upon the Writ of Error, we were all of Opinion, that there was no material Difference between Windſmore's **Caſe and this, ſo that the Judgments could not ſtand both together. And therefore we adviſed the Defendant to compound with the Plaintiff, in the Writ of Error.** 2 Cr. 565. Ant. 313.

(392) Sir William Elvis Knight, *againſt* the Arch-Biſhop of York, Martin Taylor *and* Thomas Biſhop, Clerks. *Quare Imped.*

Paſch. 17 Jac. Rot. 877.

Sir William Elvis **brings** a Quare Impedit **to preſent to the Church of Bad**worth, **and declares, that Sir** Gervas Elvis **Knight, was ſeiſed of the Manor of** Sanby, **to which the ſaid Advowſon is appendant in Fee, and held the ſame of the King, and ſo ſeiſed, did preſent one** George Turpin **his Clerk, who was admitted and inſtituted, &c. And the ſaid Sir** Gervas **ſo ſeiſed was attainted of Felony, and executed; by Force whereof, the King was ſeiſed of the ſaid Manor** ad quod, &c. **in Fee, in Right of his Crown, and ſo ſeiſed, did grant the Manor and Advowſon thereunto belonging, to the Plaintiff and his Heirs,** adeo plene & integre, &c. **by vertue whereof he entered, and was ſeiſed thereof in Fee; and ſo being ſeiſed, the Church became void by the Death of** Turpin, **whereby it belonged to the Plaintiff to preſent, and the Defendants did diſturb him, to the Damage of five Hundred Pounds.** Nottingham. Jones, 4. Incumbent, Br. 4. Ant. 102.

Actio non; **confeſſeth the Seiſin of Sir** Gervas Elvis, **and the Preſentation of** Turpin, **and the Attainder and Execution, as the Plaintiff had ſet forth in his Declaration: But further ſaith, that by vertue of the ſaid Attainder, the King was ſeiſed of the Manor** ad quod, &c. **in Fee, in Right of his Crown, and ſo ſeiſed, the Church became void by the Death of** Turpin, **whereby the King, to the Church being void, did preſent to the ſaid Archbiſhop the ſaid** Thomas Biſhop, **whom he cauſed to be admitted, inſtituted and inducted, as it was lawful for him to do: Without that, that the King did grant to the ſaid** William Elvis **the Advowſon,** prout, &c. **Whereupon the Plaintiff demurs in Law generally.** The Plea of the Archbiſhop. Br. *Quare Impedit*, 119, 120. Ant. 197.

That he is Parſon Imperſonee **of the Church aforeſaid, by the Preſentation of the King, and ſays,** quod Actio non, **becauſe he ſays, that** Gervas Elvis **was ſeiſed of the ſaid Advowſon, as of the Advowſon in Groſs, and confeſſeth the Attainder, and that after the Death of** Turpin, **the King did preſent the ſaid** Biſhop, **who was admitted, inſtituted and inducted, &c. and was Parſon** Imperſonee **at the Time of the Purchaſing of the Writ, &c. without that that the Advowſon aforeſaid did belong, and as yet doth belong to the ſaid Manor of S.** prout, &c. The Plea of Biſhop the Incumbent.

Whereunto the Plaintiff replies, that Biſhop **is not Parſon** Imperſonee **of the Preſentation of the King,** prout, &c. Ideo petit quod inquiratur, &c. **where**upon

upon Biſhop demurs in Law, that one John Sidenham Gentleman, was ſeiſed of the ſaid Manor ad quod, &c. in Fee, and ſo ſeiſed in the 16 Year of Q. Eliz. by Indenture, &c. did grant to Richard Ridley and Eleanor his Wife, the ſaid Advowſon for the three firſt Avoidances. The Church became void by the Death of one Lilly, which was the firſt Avoidance, &c.

The Plea of Taylor.

To which Church, the ſaid Sidenham ſeiſed the ſaid Manor, and (having no Right to preſent) did preſent one Richard Clifton his Clerk, and the ſaid Clifton being Rector of the ſaid Church, the ſaid Church became void, by the Deprivation of the ſaid Clifton, which Avoidance was the ſecond Avoidance, &c.

And the ſaid Sir Gervas Elvis, Father of the Plaintiff, being ſeiſed of the Manor in Fee, and having no Right to preſent to the ſaid Church, being void, did preſent to the ſaid Church, being void, the ſaid George Turpin, Qui, &c. And that he the ſaid Turpin being Rector of the ſaid Church, and that the ſaid Ridley and his Wife, being poſſeſſed of the ſaid Advowſon, the ſaid Ridley dieth, and Eleanor ſurvives, and was ſolely poſſeſſed of the Advowſon, and firſt makes Martin Taylor her Executor, and dieth, whereby he was poſſeſſed, and ſo the Church became void by the Death of Turpin, which was the third Avoidance, &c. whereby the Defendant Taylor did preſent the ſaid Biſhop his Clerk, as it was lawful for him to do, and demands Judgment, Si Actio, &c. Upon which the Plaintiff demurs in Law generally.

The firſt Point.

The firſt Point is, whether this Plea of the Archbiſhop, to counterplead the Title of the Plaintiff to the Patronage, be good or no.

And I hold it is not good: Wherein let us conſider how it ſtood at the Common Law, and what Alteration is made, as to this Caſe by the Statute.

7 Co. 26 a. Ant. 161, 162.

And firſt, for the Common Law it was plain, that neither Ordinary, as Ordinary, neither before Collation nor after, nor Incumbent, either of his Collation, nor of the Preſentation of any other, could plead to the Title of the Patronage, whereof the Reaſon was pregnant, becauſe neither of them had Intereſt in the Patronage, and therefore could not diſpute that, with which they had nothing to do; which is the Reaſon that his Collation by Lapſe (or before the Lapſe incurred, though it be a Wrong) doth not diſplace the Patronage, but ſhall be ſaid to be done in the Right of the very Patron, being nothing but Inſtitution and Induction, which are his Office as Ordinary, as well upon Preſentation, as without, though he doth them out of Seaſon.

Ant. 154.

And though this ſeemed, and was indeed extreamly miſchievous, yet the Law would not let in a Thing ſo abſurd, and againſt the Law of Nature and Reaſon, as to admit two to diſpute the Intereſt of a third.

Ant. 193. 2 Le. 58. 7 Co. 33. b.

This Miſchief notwithſtanding hath a kind of Remedy in ſome Caſes, for if the Quare Impedit were brought againſt the Biſhop, and the Incumbent, or the Incumbent alone, leaving out the Patron, the Incumbent might have pleaded in Abatement, that he was Parſon Imperſonee, of the Preſentation of ſuch an one, who was alive and not named, and then the Writ ſhould abate: So that though he could not plead himſelf to the Patronage, yet he needed not to anſwer without the Patron, which could plead to the Right of his Patronage, and ſo defend his Clerk.

Ant. 162.

But yet there were two Caſes of Miſchief ſtill, the firſt, when the Patron was joined, if he would collude or plead a falſe and faint Plea, and give way to the Plaintiff, the Incumbent was without Remedy, whereof the Common Law took little regard, both for the Reaſon before ſpoken of, and becauſe coming in by him, he was ſubject to his Plea, as Leſſee for Years, and could not ſatisfie at the Common Law.

Dy. 48. a.

And ſecondly, though it were regularly true, that the Patron was to be named, ſo that there was a Means to defend the Title, yet when the Incumbent came in by the King, or Pope, they could not be named; and yet though the Miſchief to the Incumbent was inevitable, yet the Common Law would not break her Rules to receive the Incumbent to plead the Title of the Patronage, no not in that Caſe.

This

This being ſo in the Caſe of the Incumbent, who had the whole Intereſt of the Church veſted in him, and that by the Preſentation of his Patron, by whoſe Title he was to ſtand or fall, that he could not plead the Patron's Title. Much leſs was the Ordinary to do it, for three Reaſons.

He had nothing to do with the Patronage, neither in Intereſt nor Depen- 1.
dency, as the Incumbent hath.

He hath no Medling with the Church, or the Fruits of it, as the Incum- 2.
bent hath. And if the Ordinary, having collated by Lapſe, could not plead the Title of the Patronage to maintain it (as by the Statute appears) much leſs could he do it before the Lapſe incurred.

The Law hath provided for him (if he will contain himſelf within the 3.
Bounds of an Ordinary) ſufficient Means to ſave himſelf from making himſelf a Diſturber, and hath Pleas to expreſs and deduce the ſame, which the Incumbent hath not. For if the Incumbent hath accepted the Benefice of his Preſentation, that hath no Right, or will not defend it, he muſt needs be a Diſturber, and yet was not allowed to plead the Title at the Common Law. And therefore the Ordinary cannot plead in Abatement, that the Patron is not named, as the Incumbent may; for his Office and Acts are not joyned, nor depend upon the Patrons, as the Incumbents do.

Now I hold it not impertinent in this Place, and upon this Occaſion, to ſhew, how the Common Law hath provided for the Safety of the Ordinary againſt Diſturbance, if he will not exceed his Office, nor maintain Parts, but carry himſelf indifferently amongſt them that pretend to the Patronage of the Church, as he ought to do, being in a ſort a Judge amongſt them.

First, where it hath been ſaid, that he ought to receive the Clerk of him that comes firſt, I hold the Law contary; for as he may take competent Time to examine the Sufficiency and Fitneſs of a Clerk, ſo may he give convenient Time to Perſons intereſted, to take knowledge of the Avoidance, even in Caſe of Death, and where Notice is to be taken, and not given, to preſent their Clerks to it.

But perhaps, if he do receive the Clerk of him that comes firſt, he may quit himſelf of Diſturbance, becauſe he doth nothing but as Ordinary in Law; but let him look to his Conſcience, if it be not done bona fide.

But if two or more preſent, ſo that the Title is become litigious, then Ant. 201.
cannot he ſafely receive the Clerk of any, of his own Head, except the Title be certain, but hath his Way of Safety by Jure Patronatus; and when he hath uſed the Jure Patronatus, and that finds for one Party, yet he may ſtill receive a contrary Clerk if he will, for who can let him? But that muſt be at his own Peril, which is well to be underſtood at a double Peril; that is, firſt, that the Title be the better.

Secondly, That the Patron whoſe Clerk he hath received, will plead and defend that Title; for otherwiſe he cannot do it, as hath been ſaid.

But though after Inqueſt, in Jure Patronatus, the Ordinary may accept the 2 Le. 168.
contrary Clerk, yet it is againſt Juſtice, and the Intent of the Law; for ſince it is a Proviſion meerly for the Good and Safety of the Ordinary, and he pretends Doubt, and therefore puts the Patron to this Inquiry, to his Charge and Delay to ſatisfie and ſecure him, he ought to judge and receive the Clerk according to that Verdict; and that is the true Meaning of Green's 6 Co. 29.
Caſe, that hath been cited, and of the Books that ſay, that the Ordinary is to judge of the better Title, that is, not to prejudge of his own Head, but ſecundum allegata & probata, Upon Verdict of the Right given, and found according to the Form of Law, to give Inſtitution, which is his Judgment, and the Induction his Execution.

And though it be true, that it is but an Inqueſt of Office, and therefore binds not; I confeſs it binds not but with a Diſtinction, that is, it binds not the Patron in his Quare Impedit, but is final, even to the true Patron, 2 Le. 168.
that he cannot impute Diſturbance to the Ordinary, following that Verdict, and therefore it ought to bind him to follow it. For to theſe Purpoſes it is a full Verdict, never to be tried again, as is a Slight found by the Coroner's

Coroner's Inqueſt to the Forfeiture of Goods. And therefore I am of Opinion, that if the Patron bring his Quare Impedit, in that Caſe againſt the Uſurper, and his Incumbent not naming the Biſhop, and proves his Title, that he may afterwards have an Action upon the Caſe againſt the Ordinary, for that wilful Wrong, Delay and Trouble, that he hath put him to, and he ſhall recover Coſts and Damages, not in reſpect of the Value of the Church (for there is no Damage for that by the Common Law, but by Weſtm. 2.) but for the other reſpects I ſpake of. But if he name the Ordinary in the Quare Impedit, he can have no other Action of the Caſe; neither ſhall he have ſuch Action upon the Caſe, before he hath tried his Title in a proper Action, and againſt the proper Parties.

5 Co. 109. b. Mo. 836.

5 Co. 59. a.

But yet in another Point I am of Opinion, that though but one preſent, if the Biſhop make doubt of his Title, as in many Caſes he may juſtly, being a Stranger to it, he may require Satisfaction by Jure Patronatus, for a notatione nominis, it doth not imply divers Parties, as a Juris utrum doth, but like a Quo Jure. And therefore take the Caſe to be, that a Parſon is deprived by the Ordinary, or reads not his Articles; in which Caſes the Church is void, and yet Notice muſt be given to the very Patron for that Time, or elſe the Lapſe incurs not (which is inconvenient for the Church, and a Prejudice to the Ordinary) how ſhall he now aſſure himſelf of a ſufficient Notice? For if he give Notice to him that is not Patron, for this very Turn, his Notice is vain, and the Patron perhaps knows not of the Deprivation, or if he knows it, needs not preſent without Notice given him.

I hold, that in this Caſe his way is to award a Jure Patronatus, with ſolemn Premonitions Quorum Intereſt, and then Inquiry being made who is Patron, and give him Notice, and if he preſents not within ſix Months, then the Ordinary may Collate, though that ſhall not bind the very Patron, yet it ſhall excuſe from Diſturbance upon ſpecial Matter ſhewed; but if the other ſuppoſed Patron preſent, and the ſix Months incur, Quære if the true Patron be bound, ſince there was no Notice given him. And I am of Opinion, that though without Notice, the Patron is not bound by the Lapſe, yet that is nothing to ſave the Uſurpation of another pretended Patron, who is not ſubject to give Notice.

Thus far of the Matter and Form of pleading for the Ordinary and Incumbent at the Common Law.

What Change is made by the Statute 25 E. 3. cap. 7. concerning the pleading of Ordinaries. Ant. 161.

Now we will ſee how it ſtands this Day, and what Change is made by the Statute 25 E. 3. Chap. 7. pro Clero, Stat. 3. and what is the true Meaning and Uſe of that Law, which is thus: When an Archbiſhop, Biſhop or other Ordinary, hath given a Benefice of Right devolute unto him by Lapſe of Time, and after the King preſenteth, and taketh his Suit againſt the Patron, who percaſe will ſuffer, that the King ſhall recover without Action tried, in Deceit of the Ordinary, or the Poſſeſſor of the ſaid Benefice, that in ſuch Caſes, and in all other Caſes like, where the King's Right is not tried, the Archbiſhop, or Biſhop, Ordinary, or Poſſeſſor, ſhall be received to counterplead the Title taken for the King, and to have his Anſwer, and to ſhew and defend his Right upon the Matter, although that he claim nothing in the Patronage, in the Caſe aforeſaid.

The particular Cauſe of this Law, is for the Relief only of the Ordinary that hath collated by Lapſe, and of the Clerk that is ſo collated, that they may both plead to the Title againſt the King, which when you conſider, it was a neceſſary Law, as againſt the King more than againſt common Patrons. For the King not being bound by Lapſe of Time, if the common Patron ſuffered a Lapſe, and the Biſhop collated lawfully, yet if the King, pretending himſelf Patron, brought a Quare Impedit againſt the Ordinary and Incumbent, there was no Means for them to ſave themſelves, ſince they could not deny the King's Title, and maintain the Patrons, in whoſe Default the Lapſe took Place; but the Statute gives Remedies likewiſe in like Caſes by expreſs Words, ſo that Caſes of like Nature are rather remedied by Letter than Equity.

And

And therefore firſt in the Caſe of Lapſe, a common Perſon might by Practice have turned out a lawful Collatee in one only Caſe, and that was this: A common Perſon no true Patron preſents within ſix Months, and the true Patron himſelf preſents not in Time, whereupon the Ordinary collates by Lapſe, againſt whom the Pretender brings a Quare Impedit, becauſe his Clerk was refuſed, wherein he muſt needs prevail if his Title be good. And it muſt be taken for good, becauſe neither Ordinary nor Incumbent could deny it; for De non apparentibus & de non exiſtentibus eadem eſt ratio.

This is one of the like Caſes meant in the Statute. For, in all other Caſes the Lapſe is an equal Title againſt all common Perſons.

But the commoneſt like Caſe, and that which extends fartheſt, is the Purview: For every Incumbent, that is called a Poſſeſſor, as well by Preſentment as by Collation, is allowed by the Words of the Law to counterplead the King's Title, and to ſhew and defend his own Right upon the Matter, though he claim nothing in the Patronage in the Caſe aforeſaid.

Note all the Words, for they have all their Weight: For firſt, the Incumbent muſt be a Poſſeſſor; ſo that if he have his Preſentation, Admiſſion, and Inſtitution upon the lawful Title, yet remains as he was before, under the Miſchief of the Common Law, becauſe he is not a Poſſeſſor, according to the Letter of the Law, 'till Induction. Dy. 1. b. 7 Co. 26. a Ant. 162, 163. Jones, 161.

Again I ſay, that though he be a Poſſeſſor, he muſt, by the Letter and Meaning of this Law, as well ſhew and defend his own Right, as counter-plead his Adverſary's.

And therefore clearly he cannot make himſelf Parſon Imperſonee of the Preſentation of I. S. and defend himſelf by the Title of I. D. under whom he claims not, though that were ſufficient to deſtroy the Plaintiff's Title, by Confeſſing and Avoiding, or the like, neither can he counter-plead the Plaintiff's Title, but muſt alſo make a Title to himſelf by the Word and Meaning of this Law, which I ſpeak not to bind the Incumbent by the Patron's Plea, whereof I will ſpeak hereafter, when I come to the Incumbent's Plea. Poſt. 321. 2 Le. 46, 50, 202.

But touching the Ordinary's Plea upon this Statute, I hold plainly, that he can no otherwiſe plead then he could at the Common Law, but only where he hath collated actually by Lapſe. For though the Incumbent of Preſentation be alſo admitted to plead by the Meaning of this Law, under the Word (like Caſe) becauſe the Caſe is like indeed, yet the Ordinary's Caſe before actual Collation is no Ways like in Caſe; for he hath gotten no Intereſt for himſelf, nor his Clerk, in the Church. And therefore, if the Incumbent inſtituted only at the Preſentation of another, be not within the Relief, much leſs ſhall the Ordinary, that hath no Intereſt, but an Office only, that ought to be indifferent to all Patrons, and maintain no Side. And yet more, if the Incumbent which is inducted, be Defendant, in Quare Impedit (which may plead by the Statute) and do reſign hanging the Writ, he hath loſt his Privilege of Pleading to the Title by the Statute; for as it was granted him to defend his Poſſeſſion, ſo when his Poſſeſſion is gone, there is no Cauſe for him to uſe it, which Reaſon alſo turns ſtrongly againſt the Ordinary, where there is no Poſſeſſion under him; for yet that Incumbent that hath reſigned, may plead as he might have pleaded at the Common Law. And note that Caſe of the Perſon reſigning, hanging the Writ, which the Plaintiff may plead againſt him to defeat him of his Plea, that he might once have had, hanging the Writ, whereas in a Præcipe quod reddat, if the Tenant plead a Releaſe, the Demandant cannot ſay that he had alienated, hanging the Writ, but is eſtopped. The Difference is, becauſe, that in that Caſe of the Præcipe, the Demandant by his Writ admits him Tenant, but in the Quare Impedit, he is not named an Incumbent, but a Diſturber only. Neither is the Suit for the Incumbency directly, but for the Patronage or Preſentation. And therefore in the Writ of Right of Advowſon the Incumbent is never named; neither, if the Defendant recover againſt his Patron, ſhall he be removed. Ant. 162. Ant. 162.

I have been the larger in this Diſcourſe, becauſe I ſee the Inheritances of Advowſons ſo incumbred by wilful Uſurpations, and Diſturbances of pretended Patrons, Ordinaries and Clerks, and the Multiplicity and Perplexity

plexity of ſeveral Pleas of the Defendants, be they never ſo many, whereof if any one paſs againſt him, he is barred, and the Incertainty and Variety of the Learning upon it, that it is almoſt impoſſible, if a true Patron be put to his Action, but he will be tired.

Therefore firſt, I adviſe a Plaintiff in a Quare Impedit, to name no more Defendants than needs muſt; and ſo if the Church be once full of Preſentation, ſo that there is no Danger of the Lapſe, it is in vain to name the Ordinary, and ſo to arm him with a Plea, who can now do no more hurt or good, but only to be anſwerable to the Damages, which the Patron and Incumbent (which two muſt needs be named) will be ſufficient to anſwer.

Ant. 198, 200, 207. 6 Co. 52. Accord. 1 Inſt. 344. b. Accord. 2 Cro. 93.

But if the Church be not full, but ſtand only upon Diſturbance; then you muſt name the Ordinary, or elſe he will collate (hanging the Suit) by Lapſe, whereas if you name him, he muſt either diſclaim, and then you may have Judgment againſt him, or elſe he muſt plead, and allow himſelf a Diſturber, and then he can have no Lapſe. But if he Diſclaim, and the Plaintiff will not take his Judgment, but maintain him a Diſturber, and that be found againſt the Plaintiff, I hold (as I have heretofore holden) that the Biſhop's Collatee hanging the Suit ſhall not be removed, for he can have no Judgment nor Writ non obſtante reclamatione Epiſcopi, becauſe as againſt him he is barred.

Next in this Caſe, I adviſe him to name no more Diſturbers than are likely to have reaſonable Titles; for every Diſturber will make a ſeveral Title and Traverſe, or confeſs and avoid the Plaintiff's Title, whether he himſelf have good Title or not; ſo it were better not to name them; for they can but preſent, and get their Clerks in, hanging the Suit, which will be removed by the Writ to the Biſhop, if their Title be not good; but ſuch as have reaſonable Titles are fit to be named, that their Titles may be diſcuſſed directly at the Aiſe of the Parties, and not left to an after-game, the Title to be tried between the Incumbent that comes in hanging the Writ, and the Clerk that is admitted upon the Writ to the Biſhop. For I hold it clear, that the Biſhop cannot refuſe to admit the Clerk of the Party that recovers, and return a Plenarty upon another's Preſentation and Right, for that is the way to confound all; for, if that Return be falſe, it cannot be traverſed, for there is neither Party nor Day in Court to counterplead. And if you ſay, the Writ is only non obſtante reclamatione of the Parties, and this is a Stranger; I anſwer, that it is clear, that the Clerk that came in, hanging the Suit, by the Preſentation of them that have no Right, ſhall be removed. And ſhall the Ordinary (that is not received to plead to the Title of Patronage, hanging the Suit wherein he is made a Defendant) make himſelf Judge of Titles after Judgment (whereunto he is Stranger) to make it fruitleſs?

Co. L. 344. b. 2 Cro. 93.

6 Co. 52. a. F. N. B. 47. K. Ben. 19. Mo. 572. Dy. 26. a. Ant. 193, 200.

Syd. 93.

If you ſay, that he that hath recovered may remove the Clerk by Scir. fac. I anſwer, that that prevents not the Abuſe of an Ordinary, if the Return be falſe, which it may be, becauſe either there is no Plenarty, or not upon better Title as he returns, whereupon there is no Anſwer.

And again, it is unjuſt to put one to a double Suit, where the Satisfying of the Writ is but Executio juris, quæ non habet injuriam, to give him Poſſeſſion according to his Right. But if his Adverſary's Right be the better, it hurts him not, but enables this Clerk to try his Right, which without this Admittance, he could not. As in the Caſe of Copyholders Admittance works.

2 Point.

Now I will ſpeak next to the Plea of Biſhop the Clerk, and make that the ſecond Point, becauſe it hath much Affinity with the firſt Point, that hath been handled, and the Reaſons of it.

Concerning the Pleadings of Incumbents. Ant. 163.

Wherein firſt I agree, that the Plea of the Incumbent is good. For he had pleaded himſelf Parſon Imperſonee, and ſo made himſelf Poſſeſſor according to the Statute, and hath alſo laid of whoſe Preſentation, as he muſt, that it may appear to the Court, that he defends his own Title and his Patrons, whereupon his own depends according to the Statute. Now though he be not in Truth in, of the Preſentation of the King, as he pretends, but

Dav. 76. b. Ant. 162.

but of the Preſentation of Taylor (who hath alſo pleaded ſo) yet it doth not appear which of thoſe Pleas is true, nor the Plea of the one doth not eſtop the other, ſo that both are to be admitted.

Then touching the Replication of the Plaintiff, I hold it informal, for two Reaſons;

First, Where he ſays, He is not Parſon Impersonee of the Preſentation of the King, he ſhould have induced it with alledging of whoſe Preſentation he was in, with an abſque hoc; or elſe it may be that he is not Parſon at all, and then he ſhould have pleaded ſo, and not a Negative pregnant, as this is, as againſt a Fine, partes finis nihil, &c. but ſuch another

Secondly, His Concluſion ſhould have been Judgment, if it ſhall be received to this Plea. But becauſe both theſe are but Form, the general Demurrer takes no hold of them.

Now where it was ſaid that the Replication ſhould have been, that he was not Parſon Impersonee generally, or modo & forma, becauſe he is a Poſſeſſor within the Law of whoſe Preſentation ſoever; I hold the Replication as it is very good.

First, If a Man makes his Title more ſpecial than he needs, in many Caſes his Adverſary ſhall take Advantage by it; For the Law ſhall receive that he is beſt appraiſed of his own Title. Ant. 103, 105. Dy. 365. b. 366. a. 312. b. Ant. 81.

But in this Caſe the Parſon cannot plead that he is parſon generally, but he muſt ſhew neceſſarily of whoſe Preſentation, as all the Books and Precedents are. And yet that is not Form, but therefore material, becauſe by the Statute he muſt not only be a Poſſeſſor, but he muſt, (as hath been ſaid) as well ſhew and defend his own Title, that is his Patron's, whereupon his own depends, as counterplead his Adverſaries.

Now then he muſt as well make it appear to the Court that the Title he defends is his Patron's, as that he is Poſſeſſor; for he cannot ſay that he is Parſon of the Preſentation of Taylor, and make a Title to the King as Patron: So it is material to ſet forth to the Court of whoſe Preſentation he is in, and by Conſequence it is traverſable. Ant. 319.

In a Quare Imped. you lay the Preſentation of the laſt Incumbent, and you name him, yet it is all one to the Matter whether it were he or another; ſo 'twere the ſame the Patron that preſented; yet you ſhall traverſe the Preſentation of the ſame Man. 3 Point. Ant. 102.

Now to the Plea of Taylor, which I make the third Point; wherein the Caſe is thus: A Man had a Grant of the Avoidances of an Advowſon appendant, made by him that was ſeiſed in Fee of the Manor and Advowſon. The Church voids, and the Grantor uſurps, and then it voids the ſecond Time, and then another uſurps that was likewiſe ſeiſed of the Manor, and forfeits it to the King, who makes a Grant of the Manor and Advowſon in his verbis, &c. to the Plaintiff. De uberiori gratia, &c. dedit & conceſſit eidem Wil. Elvis Mil' Manerium pred' cum pertinentiis ad advocationem Eccleſiæ præd' eidem Maner' ſpectan'& pertinen' per nomina Manerii de Sanby alias Samby, in Comitatu Nott' Ac advocationem Eccleſiæ de Babworth eidem Maner' ſpectan' & pertinen' adeo plene, integre & in tam amplis modo & forma prout predict' Gervaſius ea habuit tenuit & gaviſus fuit in tam amplis modo & forma prout Manerium illud cum pertin' ad quod, &c. ac prædict' advocatio Eccleſiæ prædict' ad manus ipſius domini Reg' nunc devenerunt, ſeu devenire debuerunt ratione attincturæ præd' Gervaſii aut in manibus ipſius domini Regis tempore confectionis earundem literarum patentium exiſtebant. 2 Ro. 371.

And then the Church avoids the third Time, and the Executor of the Grantee of the three Avoidances preſents, and his Clerk is received, whereupon the Plaintiff brings a Quare Impedit.

This Point yields two Queſtions.

First, Whether notwithſtanding the Uſurpation the Grantee may nevertheleſs preſent again upon every Avoidance, as if there had been no Uſurpation. 1.

The Second, Whether the King's Grant (as it is) doth paſs the Advowſon for the laſt Turn; for elſe if that Avoidance were gained from the Grantee, and ſo come to the King by the Forfeiture, and not granted again by the King, then Judgment ought to be given for the King. But my Opinion is for the Plaintiff in both. 2.

To the firſt. Ant. 102.

As to the firſt of theſe, it muſt be confeſſed that an Uſurpation at the Common Law, did ipſo facto, gain the Poſſeſſion, not only of the preſent Avoidance, but of the Whole State of the Advowſon againſt all the World, which is the Reaſon that the laſt Preſentation is always to be anſwered in a Quare Impedit, and the Law is the ſame ſtill in all Caſes where the Statute of Weſtm' the ſecond hath not made Alteration. And in this Caſe, if the Uſurpation had been made by any other but by him that was ſeiſed of the immediate Reverſion in Fee, no Man would have doubted, but that it would have gained the Poſſeſſion of the whole Advowſon, which could not have been continued but by a Writ of Right, which the Grantee of the three Avoidances could not have, by Reaſon of the Feeblenes of his Eſtate, nor the Reverſioner in Fee-ſimple could not have had it during thoſe three Avoidances, but after he might have his Writ of Right or Quare Impedit, if he were within any of the Caſes of W. 2. which in this Caſe is not, becauſe the Reverſion is removed, and is not now in that Perſon that was ſeiſed of it at the Time of the Uſurpation, and ſo being but a Right could not be granted.

Ant. 285. Co. L. 249. a.

All that is objected is this, That when he in the Reverſion uſurps upon his Leſſee for Years, he cannot gain the whole Inheritance of the Advowſon by Wrong, and the new Inheritance by Wrong he cannot gain out of a Leaſe for Years only. So for an Impoſſibility in Law it ſhould work, but to gain that one Avoidance, and leave the Eſtate as it was before in the Leſſee, even as it was in the Caſe of the King, when an Uſurpation is made upon him, which is the only Caſe in Law of that Nature.

Mo. 189. 5 Co. 123. 8 Co. 76.

This is a Conceit, and it is but a Conceit. For of poſſeſſory Things an Expulſion may be made as well as a Diſſeiſin. And therefore if a Man made a Leaſe for Years of Land, and a Stranger put out the Leſſee, he doth alſo diſſeiſe him in the Reverſion: But if the Leſſor put him out, there is no Diſſeiſin committed, and yet the Leſſee hath loſt his Eſtate, and hath but a Right to it, and that whether he will or no: For though it be true, that when two are in Poſſeſſion, the Poſſeſſion is judged in him that hath Right, for he only poſſeſſeth, though the other be in Poſſeſſion too, and take away the Trees, Corn, or the like; yet, when the true Owner is clearly put out and removed, then he hath no longer Eſtate or Poſſeſſion, but Right only, and hath no Election to be in Poſſeſſion or not in Poſſeſſion, as that Caſe ſtands, and therefore clearly he cannot now grant his Term. And if the Leſſor bring an Action of Debt for his Rent due at Michaelmas, the Leſſee ſhall plead that he did enter upon him, and put him out, and he continued his Poſſeſſion at the Term: For he cannot have Rent out of that Land that he himſelf poſſeſſeth. And if the Leſſor after ſuch Expulſion dieth, the Land ſhall deſcend in Poſſeſſion to the Heir, and the Executor ſhall not claim that that was a Leaſe; for a Term never bears a que eſtate. But it is true that there are certain Caſes wherein a Poſſeſſion cannot be gained.

Co. L. 3. 68. Plo. 233. b.

3 Cr. 15. Poſt. 326.

1. First, For Privilege of Perſons; for the King cannot be diſſeiſed, but all Intruders are but Treſpaſſers to him, and if he will he may charge them by Actions of Account, as Bailiffs; yet he may if he will, bring a Writ of Right of Advowſon.

2. Another Caſe is in reſpect of the Nature of the Thing whereupon the Wrong is committed. For if a Man receive my Rent claiming it as his own, when it is not, and ſo feed upon my Common without Right, he hath neither diſſeiſed me of the one nor of the other; but if I ſhould bring an Aſſize, and ſo admit my ſelf diſſeiſed, and he make Title; and ſo we are both agreed that the Poſſeſſion is moved, then it is ſo by Fiction of Law and Conſent of Parties, that was not ſo in Nature.

8 Co. 45. b. 55. a. Co. L. 323. a. 9 Co. 51. a. 112. b.

Ant. 95.

A Man cannot, by wrongful Seiſin of a Villain in groſs, gain either Eſtate in his Blood, or Poſſeſſion of his Perſon, otherwiſe than as of a Freeman by falſe Impriſonment.

Ant. 140. Mo. R. 277.

But an Advowſon is one of the Things whereupon Uſurpation works more violent than upon any other Poſſeſſion corporal: And therefore where, upon Diſſ. of Lands, you have poſſeſſory Actions for Remedy, in the Caſe of Advowſons

bowſon if an Uſurpation be compleat, with a Plenarty of ſix Months, you are driven to your Writ of Right.

And where it is objected, That the Caſe is as good, as if the Grant of the three Avoidances had been to three ſeveral Perſons, in which Caſe it is conceived that the Uſurpation upon one had bound the reſt. Object. 3 Cr. 19. Kel. 1.

It is anſwered, That the Caſe is not altogether like, becauſe when all the Avoidances are granted to one, he may by his Laches prejudice himſelf rather than another. Anſw. 1.

But another, and more pregnant Anſwer is, that which hath been given, that one Uſurpation puts all out of Poſſeſſion. Anſw. 2.

So then the Concluſion is, That Elvis by his Uſurpation having got all that was granted out, and having his own Reverſion in Fee-ſimple in himſelf, and forfeiting it to the King, the whole Advowſon is in the King in Fee-ſimple.

Now follows the ſecond Queſtion of the third great Point, Whether this, being then their Avoidance, paſt to the Plaintiff by the King's Grant. The ſecond Queſtion of the third great Point.

Wherein firſt it muſt be confeſſed, that tho' the Whole Advowſon, were at the firſt Appendant, yet the three Avoidances were by the Grant made in Groſs.

Next, if this third Avoidance were in the King in Groſs, I am of Opinion that it doth not paſs from the King for two Reaſons.

Firſt, That the King's Grant is expreſly of the Advowſon as appendant, and therefore if it be in Groſs, the King is deceived: For in the Caſe of Appendancy it paſſeth, but as a Part in Effect of the Manor; therefore if the King grant the Manor as largely as Elvis had it, it would paſs without ſpecial naming. But if it be in Groſs, it is as ſeveral Grants of ſeveral Things, which differ both in Letter and Effect, and in Meaning. Ant. 223.] Ant. 170.

Secondly, (which makes it more clear) if the King had this Avoidance in Groſs, and the Reverſion in Fee Appendant, as it always was, then the King's Grant works upon the Reverſion appendant without touching the Groſs, and amounts to no more but a Grant of ſo much of the Advowſon as is Appendant, like to a Grant of the Manor of D. in D. But now, I hold that the King had not two Eſtates in this Advowſon, but one only conjoined, and conſolidate of the rightful Reverſion, in which the poſſeſſory Eſtate is drowned and extinct. The rather, becauſe there is neither Right left, nor Means of a Recovery in the Grantee, ſo that it is in Effect as much as if the Grantee had ſurrendred or granted the Avoidances unto the Reverſioners. And therefore take the Caſe of 9 H. 7. that he in Reverſion diſſeiſes his Tenant for Life, and dies ſeiſed, this is Diſcent to take away the Entry of Tenant for Life: (But I hold it ſhall not take away the Entry of a Stranger) becauſe as to him it is but the Eſtate for Life ſtill, and but a fictitious, and not a true diſcendable Eſtate. For a Grant to J. S. and his Heirs during the Life of J. D. is no Fee but a ſpecial Occupant, as is reſolved in Chudleigh's Caſe, but a Diſſeiſin of an Eſtate for Life by Neceſſity in Law makes a quaſi Fee, becauſe Wrong is unlimited, and ravens all that can be gotten, and is not governed by Terms of the Eſtates, becauſe it is not contained within Rules. So likewiſe if the Leſſor ejects his Leſſee and dies, the Poſſeſſion deſcends to the Heir of one joint Eſtate, and yet the Right remains ſtill to the Leſſee. And in both theſe Caſes, if the Leſſor grant the Reverſion, the Grant is void, for there is no Reverſion. And yet it was ſtronger if the Leſſee for Years, or Leſſee for Life after ſuch Diſſ. and Expulſion by the Reverſioner ſhould releaſe unto him. And the principal Caſe is in Effect as good, where the Right of the Grantee is none in Law, as hath been ſaid. Co. L. 139. a. 1 R. 140. 5 Br. eſtate 50. utr.

And Note that two Fee-ſimples that may ſtand in ſeveral Perſons diſtinct, when they meet in one Perſon, cannot do ſo, but the greater and abſolute Fee doth ſwallow up the baſe and limited Fee, So it is adjudged in Huſſy's Caſe, Hillar' 40 Eliz. in the Common Pleas, cited in the Caſe of Alton Woods, Co. lib. 1. fol. 496. which was that Charles Duke of Suff was ſeiſed of the Advowſon of Welborne in the County of Lincoln in Tail, the Reverſion to the King in Fee: And the Duke by Deed inrolled, granted the Advowſon in Fee to the King, and then the Statute 34 H. 8. cap. 21. of Confirmation in Patents was made, and then the King granted the Advowſon in Fee to 3 Cro. 519. Moor 421. 582. Jones 6. Ander. 26 42. Co. L. 18. a.

another, and it was adjudged a good Grant: For the King had not two diſtinct Fees, but one only made of two conjoined and conſolidate together; and ſo is Auſtin's Caſe, 1 & 2 Ph. & Ma. cited in Walſingham's Caſe, fol. 560. which was thus. Sir Thomas Wyat being Tenant in Tail, the Reverſion in the Crown, made a Leaſe to Auſtin, rendring a Rent, and died. Sir Thomas Wyat the Son accepted the Rent, and was attainted of Treaſon and put to Death, leaving Arthur Wyat his Son. And it was adjudged that Auſtin's Leaſe was void. For though it were made good by the Acceptance of the Rent, yet by the Attainder the Eſtate Tail was barred, and extinct, as if Wyat the Perſon attainted had died without Iſſue, and ſo the Land came to the King in Point of Reverter, and then the laving of Leaſes would not preſerve a Leaſe that was in Law ended and determined. Which had been otherwiſe, if a Reverſion in Fee had been in another, and not in the Crown: I hold the Law the ſame, if Tenant in Tail and the Reverſion in himſelf be attainted of Treaſon.

Exception Br. 19. Plo. 115. a. Plo. 560. Dy. 155. p. 65. 107. p. 26. poſt. 346. Yel. 150. 2 Rc. R. 491. Bridgm. 27.

Yelv. 150.

In the Argument of this Caſe, the Judges ſpake publickly, and at large. The Court agreed una voce upon the firſt and ſecond great Point.

My ſelf, Warburton and Winch, did alſo agree ut ſupra. But in that only Hutton differed; and ſo Judgment was given for the Plaintiff.

Star. Chamber.

(393) Dame Sarah Darcy, Clement Cook, Eſquire, Plaintiffs, *verſus* Robert Leigh & alios Defendants.

THE Caſe was, that Sir Robert Langley Knight, being ſeiſed of divers Lands in Lancaſhire, had Iſſue divers Daughters, whereof one was called Katharine, and he ſo ſeiſed, conveyed certain Lands to the Uſe of the ſaid Katharine in Tail, the Remainder to his own Heirs, and died; Katharine was married to one Leigh, and in Lent 13 Eliz. Leigh and his Wife ſuffered a Common Recovery of theſe Lands at Lancaſhire, to the Uſe of Leigh and his Wife, and the Heirs of Leigh; and in that Recovery, Leigh and his Wife appeared by Attorney, and after died without Iſſue, (but had had Iſſue by her Huſband) ſo that he was every Way to be Tenant by the Curteſy, and then he died 29 Eliz. having before conveyed the Land to this Defendant Leigh, being (as it is ſaid) his Baſtard Son againſt whom the Heirs of the Common Law brought a Writ of Error, aſſigning for Error that Katharine was within Age at the Time of the Recovery, whereupon Iſſue being taken, it was found for the Plaintiff in the Writ of Error, Anno 43 Eliz. the Defendant being preſent, which failed by Diſcontinuance.

Co. L. 380. b. 10 Co. 43. a. Pop. 130.

Ante 196. Yel. 1. 2 Saund. 213.

And in another like Trial in another Writ of Error, thirteenth Year of the King, which paſſeth likewiſe againſt the Defendants by Default, and that alſo failed by the Death of ſome of the Parties. And now 17 Jac. upon a third Writ brought by theſe Plaintiffs, being Heirs to Langley, againſt the Defendant; a Jury being charged again upon the ſaid Iſſue of Nonage, and the Evidence given at large on both Sides, the Plaintiffs became Nonſuited, and brought a new Writ of Error, and alſo exhibited this Bill into the Star-Chamber againſt one Chatterton, Whitehead, Teatlow, and Booth, charging them with Perjury in their Depoſitions in the ſaid Trial as Witneſſes, for Leigh, and againſt Leigh for Subornation of the Perjury.

Perjury againſt Whitehead was aſſigned, that he depoſed directly that Katharine was of full Age at the Time of Recovery. Againſt Chatterton that he depoſed himſelf to be 70 Years of Age. And againſt Tetlow and Booth, becauſe they affirmed his Age ſo. And againſt Booth another Point, that he depoſed at this Trial that he had not been formerly depoſed in the Caſe.

This Caſe was heard three Days, namely upon the Merits; that is, Whether theſe Deponents or any of them were perjured or no. For it was agreed by the Court the Bill being laid ſo, though there had been Proof of undue Preparation of the Witneſſes (which is puniſhable though their Teſtimony were true) yet it could not be brought to Sentence upon this Bill.

Touching the Perjury was produced for the Parties of the Plaintiffs, the Office after the Death of Sir Robert Langley, which was found 20 January

4 Eliz. whereby it was found (the Jury being Eſquires, and Gentlemen of good Quality) that Katharine at the Time of the taking of that Inquiſition was of the Age of eighteen Years and a half, and two Months and ſeven Days, and no more in theſe expreſs Terms: So then ſhe muſt be born the thirteenth of May, 7 E. 6. who died in June after, and then ſhe could not be 19 at the Time of the Recovery.

There were alſo other Proofs of Depoſition pro & cont. for the Plaintiffs and Defendant.

Whereupon the Cauſe being brought to Sentence, it was holden unfit for the Court, and therefore left abſolutely to the Trial at the Common Law, without deſcending at all into the Merits of the Cauſe, to avoid prejudicating the Trial, and without ſo much as reſerving the Perjury to the Court, if the Trial at Law ſhould paſs for the Nonage.

The Reaſons whereof were as follow.

It was ſaid there were Cauſes that originally and in their own Nature are criminal, and proper for this Court, as Riots, Forgeries, imbracing of Juries, preparing of Witneſſes, and the like, which are all Faults puniſhable here be the Title good or bad; theſe are fit for the Court whenſoever they come in: But there are Cauſes alſo examinable in this Court which depend upon a Queſtion originally and directly Civil, and ſo are Faults, and not Faults, as that civil Queſtion or Title is in Truth, on the one Part, or the other.

As for Example in this Caſe, the Perjury of Whitehead meerly depends upon the Title, and that depends upon the Age of Katharine, ſo that properly, primitively and directly, the Queſtion is meerly Civil, and determinable at the Common Law, and the Charge of Perjury is as if it were taken for granted, that Katharine were within Age, which is Queſtio alterius fori, and ſub judice, under Trial in his proper Court, ſo that this is a Way by Policy, by an oblique Means to hear and determine Titles in this Court, and by a Kind of Prevention to take the Office of the Common Law and Court Civil out of their Hands: For if Whitehead in this Caſe ſhall be cenſured for Perjury, ſhall not this Sentence in Effect perjure as many as ſhould afterward depoſe the full Age of Katharine, and ſo choak both Title and Trial at Law; which may beget an inſufferable Inconvenience: For ſo, upon the firſt Trial in every Title the Party againſt whom it ſhall paſs, may draw all the Witneſſes in Queſtion in this Court for Perjury. And ſo all his Witneſſes ſtanding upright he may convince the Truth of Perjury.

And this Caſe was yet made the more unfit for this Court by the Circumſtances.

Firſt, That the Queſtion was of ſo old Date, of almoſt 50 Years, though it were true that it could not be queſtioned during the Life of Leigh, the Huſband of Katharine.

Secondly, That the Poſſeſſion of the Land had gone all the while accordingly to the Recovery.

Thirdly, That the Trials and Non-ſuits, had been pro & contra, and the Depoſitions of Witneſſes both Ways, and the Queſtion depending upon Compariſon of Ages, and other Circumſtances and Inferences of much Subtilty and Incertainty, which were proved, and diſproved by Perſons, ſome as young or younger, few or none as old, or elder than Katharine, of whoſe Age they ſpeak. Whereas I obſerved the Wiſdom of the Common Law did allow none to be a Jury-man in ætate probanda, that was not forty-two Years; for he tried Things twenty-one Years paſt, and is not to be a Juror till he is twenty-one Years.

Laſtly, There was a Writ of Error then depending, wherein the Title was to be tried in his proper Court and Courſe, which it was no Reaſon to prejudice by the Sentence of this Court; the rather becauſe it appeared to the Court to be a Queſtion fit to be ſifted by Hearing and Viewing of the Witneſſes, and weighing their Credit and Certainty of their Teſtimony, and confronting of them as there ſhould be Cauſe, and applying apt and ſudden Queſtions by an intelligent Judge, for which they could not be prepared, All which Advantages are wanting in Depoſition in Paper.

And

And this Court hath two Liberties which they uſe to very good Purpoſes.

The firſt where Juries muſt of Neceſſity give a Verdict, they may leave their Sentence with a Non liquet.

The other, they may ſend the Cauſe to another Court, to which it more properly belongs, and either abſolutely diſmiſs it hence (as here they did) or reſerve the Crime after the Civil Part is ended.

(394) Steed *verſus* Hartley.

Tr. 18 Jac. Rot. 299.

Replevin. Ante 189, Ante 305, 284. Yel. 2. 6. 182. 2 Ro, 621. 3

STeed brought a Replevin *verſ.* Hartley for taking his Cattle at Ballenden, at the Place called Steed-houſe. The Defendant makes Conuſance as Bailiff of Walter Haukeſworth, in loco, &c. And ſays that Houſe was holden of the ſaid Walter as of his Manor of Ballenden, by Rent, &c. And that for the Rent he did diſtrain. The Plaintiff doth plead in Bar, that the Place is out of the Fee of the ſaid Walter, whereupon Iſſue was taken and found for the Defendant. And Harris moved in Arreſt of Judgment, that the Ven' fac' was de viceneto de B. only. Where it ſhould have been alſo de viceneto Manerii de B. But the Court gave Judgment for the Plaintiff. For in an indifferent Caſe the Court ſhall never preſume, that the Manor is larger than the Town: To defeat a Verdict.

1 Cr. 480. 2 Cr. 302, 405.

Caſe. (395) Clerk *verſus* Wood.

Hutt. 39. Ante 305. Jones 2.

CLerk brought an Action of the Caſe againſt Wood, and declared that he was ſeiſed of a Meſſuage in Fairfield, and preſcribes to have Common and Paſture in ſeven Acres of Land there, and likewiſe to have a Way from the ſaid Meſſuage, over the ſaid ſeven Acres to Buntinford, and that the Defendant had plowed up the ſaid ſeven, whereby he loſt both his Common and Way: The Defendant pleads Not guilty, and Verdict for the Plaintiff. And Jones moves that the Viſne was from F. only, where it ought to have been alſo from B. becauſe he could not be guilty except there was ſuch a Way. And if the Iſſue had been upon the Preſcription for the Way, the Viſne muſt have been from both. But yet the Court gave Judgment, becauſe the Point in Iſſue appearing, and direct is upon the Diſturbance, which was only in Fairfield where the ſeven Acres lie.

Ante 190.

(396) Reynolds *verſus* Buckle.

Tr. 17 Jac. Rot. 862.

2 Cr. 312. Yel. 228. Ante 77. Ante 69. 113, 312. 2 Cr. 86. 5 Co. 43. Pop. 167. Plo. 92. b. 1 Leo. 110.

INter Reynolds & Buck' in an Action of Debt, the Plaintiff declares upon a Demiſe for Rent.

The Defendant pleaded, that before the Rent due the Plaintiff did enter upon him, but did not ſay that he did expell him or hold him out, and ſo Iſſue was taken Non Intravit, and found for the Defendant, and Judgment was given for him; for tho' the Plea in Bar was inſufficient, yet the Verdict was full to the Iſſue.

Caſe. (397) Poland *verſus* Maſon.

Hutt. 37. 2 Ro.R. 342. 1 Cr. 271. 276. Latch. 175. Ben. 202. Ante 305. Jones 302. 1 Ro. 43, 48. Pop. 210. 2 Cr. 312.

POland brought an Action of the Caſe againſt Maſon, for theſe Words, I charge him with Felony, for taking of Money out of the Pocket of Henry Stacy: After Verdict for the Plaintiff for the Inſufficiency of the Words, querens nihil cap' per billam.

(398) Powell *verſus* Winde. Caſe.

POwell an Attorney brought an Action of the Caſe againſt Winde for theſe Words, I have Matter enough againſt him; for Mr. Hartley hath found Forgery and can prove it againſt him. Upon Iſſue, Not guilty, and found for the Plaintiff, he could have no Judgment. Hutt. 41. meſme ca. Ante 305.

(399) John Nevill *verſus* Yarwood. Information.

Trin. 18 Jac.

JOhn Nevill exhibited an Information againſt Yarwood, for uſing the Trade of a Baker againſt the Statute of 5. The Defendant by Henden Serjeant pleaded that this Uſage of the Trade was in ſuch a County, and that by the Statute 31 Eliz. it ought to be ſued and tried in the ſame County at the Quarter-Seſſion or Aſſize, and not in any wiſe out of the County. And the Opinion of the Court was ſo. Ante 257. Cr. Car. 112, 490. 2 Cr. 85. Mo. 886. Syd. 303. 1 Cr. 347. 2 Cr. 178, 538. Ante 184, 251. 2 Cr. 179.

(400) Sherley *verſus* Underhill. *Quare Imped.*

P. 18 Jac. Rot. 2057.

GEorge Sherley Baronet brought a Quare Imped. againſt Underhill to preſent to the Vicarage of the Church of Nether Etington in Com' War' the Trial was had by Niſi prius for the Plaintiff, and Judgment was given by the Juſtices of Aſſize, in theſe Words, Ideo conceſſum eſt quod pred' Georgius recuperet vers' prefat' def' preſentationem ſuam ad Eccleſiam pred' & quod habeat breve Epiſcopo ad admittendum clericum ſuum ad Eccleſiam prædict'. The Defendant brought a Writ of Error, reciting, Quia in Recordo, &c. inter Georgium Sherley mil' & Baronet' & præd' Underhill. Error, &c. Whereupon the Record and Proceedings were ſent into the King's Bench, and a Mittitur entred upon the Roll here, and Error aſſigned in the King's Bench. And now Harris and Hendon moved that the Record was not removed, becauſe the Writ of Error was Knight as well as Baronet, ſo not the ſame Perſon, which the Court did agree. Hutt. 41, meſme ca. 2 Cro. 633. Mo. 894. Winch. Ent. 801 or 805. Winch. 9. Yel. 130. Ante 194. Pop. 203, 212. 2 Cr. 442. 1 Saund. 74. 1 Ro. 450. 2 Cr. 371. Yel. 6.

Then they moved that the Record of the Judgment might be amended according to the Writ, Quod recuperet præſentationem ad vicarium Eccleſiæ prædict' &c. which was alſo granted and amended accordingly. Though it was objected, that the Judgment was not given by his Court, but by the Juſtices of Aſſize. Palm. 199, Accord. 1 Bull. 184.

Upon this Caſe was ſhewed two Precedents, one M. 33 & 34 El. in B. le Roy, between Tho. Wyld Plaintiff, and John Wheeler Defendant, and the Judgment was Quod recuperet vers' præfat' Thomam Wheeler, and it was amended in the Exchequer-Chamber after a Writ of Error. And the like Hillar' 42 Eliz. between Stephany and John Morgan Wolfe, and the Judgment was Quod recuperet vers' prefat' Morgan, and it was amended in another Term. Mo. 366. Dy. 258. Hutt. 42. 2 Cro. 631. 3 Cr. 865, 400. Winch. 9. m. ca. quoted.

(401) Scot *verſus* Lawes. Debt.

SCOT brought an Action of Debt againſt Lawes Clerk, upon the Statute of 21 H. 8. the Writ was Precipe Willielmo Lawes quod reddat nobis & Johanni Scot qui tam pro nobis, quam pro ſeipſo ſequitur 110 l. quas nobis & præfato Johanni debet, &c. and declares for taking to Farm ſixty Acres of Land, and holding the ſame ſix Months per quod Actio, &c. for ſixty Pounds, and further for taking to Farm other Lands, and holding the ſame five Months, per quod Actio, &c. for fifty Pounds: The Defendant pleads Quod ipſe non debet præfato Johanni qui tam, &c. præd' one hundred and ten Pounds, nec aliquem inde denarium in forma qua, &c.

Whereupon

2 Cro. 653.

Whereupon Issue, and the Jury found that the Defendant did owe thirty Pounds, and for the rest, quod non debet, Hendon in Arrest of Judgment took two Exceptions.

1. First, That the Verdict expresses not for which Farm, nor for which of the Monthys the thirty Pounds were due.

This Exception was not regarded by the Court, because the Demand and Issue was for one hundred and ten Pounds in general, though it had been formal to have distinguished better.

2. The second Exception was, That the Defendant hath not answered the Writ and Declaration: For the Plea ought to have been as the Demand is, Quod ipse non debet dicto Domino Regi, & præfecto Johanni qui tam, &c. Which the Court regarded the rather, because the Statute of Jeofails excepts penal Statutes.

(402) Hugh's Case.

Prohibition. Register 42. b. 1 Roll. 87. Styl. 462. Mo. 428. Post. 332. Cr. Jac. 90, 91. 2 Cr. 432. 328.

Sir Thomas Hughs of Grays-Inn prayed a Prohibition by Henden Serjeant, because he being of Counsel with the Defendant in an Action upon the Case, for saying the Plaintiff had murthered three Children: Whereunto the Defendant pleaded Not guilty. And at the Trial, Hughs to extenuate the Damages for his Client, did urge and press the Fact to make the Matter probable so far as might tend to the Defamation of the Plaintiff. And because it was in his Profession, and pertinent to the Good and Safety of his Client, though it were not directly to the Issue, a Prohibition was granted. 2 Cro. 90.

(403) Badham's Case.

Pasch. 14 Jac. Rot. 1014.

Ejectione. 1 Ro. 196. 1 Cr. 563. 5 Co. 43. 2 Cr. 116, 457, 458.

Ejectione Firmæ, by Badham of the Demise of Benjamin Crockley, for Land in Gloc. The Defendant pleads Not guilty, and Process continued against the Jury, till a Writ of Distringas cum octo talibus was awarded return' octabis Hillar' 17 Jac. at which Day Richard Tripets of Dersly, was returned one of the Tales, and the Jury made Default, whereupon a Distringas cum sex talibus, was awarded return' mense Paschæ, 18 Jac. And at the Return Richard Tripets was named as well in the Writ of Distringas as in the Panel Tales, and by that Name was sworn with eleven more, and Verdict given for the Plaintiff. And upon Exception taken, the Court required Proof that it was the same Person. And at last the Under-Sheriff of Glouc. that made the Return, but was now out of his Office (a new Sheriff being chosen) toward the End of Mic. Term 18 Jac. deposed in Court, that he knew not the Man, neither that he was one of the Twelve that gave the Verdict; but yet affirmed that there was a Rich. Tipets of Dersly, in his Freeholder's Book, but no Tripets; and two other Strangers deposed that they knew Richard Tipets of Dersly, and that there was no Tripets there, and that Tipets was the Man sworn of the Jury, which they knew, because they saw him sworn, being about the Court by Accident; and some Writing was also shewed proving his Name Tipets: Whereupon by Order of Court, the Writ and Panel was made Tipets, and Judgment given for the Plaintiff, for Damages only, for the Term was ended. And the Entry of the Rule is in the Bill of Pleas of M. Brownloe, by Othogaire the Secondary, 16 Novemb' 18.

5 Co. 42, 43. a. The Writ and Panel amended. 2 Cr. 457.

(404) Clanrickard *verſus* Liſle.

INter comitem Clanrickard, and Frances his Wife Demandants, and Robert Viſcount Liſle in the Formedon before mentioned, Judgment was pronounced 16 Novemb. 18. and Writ of Error was brought by the Earl of Leiceſter Tenant, bearing Teſte 27 Novemb. and then allowed, and in majorem cautelam a Superſedeas made againſt Executions, and yet the Demandant obtained a Writ of Seiſin, bearing Teſte nono Die Octobris before by Warrant of the Judgment which was afterwards entered, but as of Octab. Mich. being the laſt Continuance, which being opened to the Judges, and they well knowing that Judgment was not pronounced 'till Novemb. 16. ſo that the Tenant could not have a Writ of Error before, neither ought the Defendant to have a Writ of Seiſin before; for by this Trick any Writ of Error might be defeated, as to Saving Poſſeſſion. And therefore a new Superſedeas was awarded againſt that Writ of Execution quia erronice, &c.

Hutt. 43. Arr. 1, 46, 273. 8 Error Br. 55. Benl. 99.

Mo. 461. Noy. 76. Dy. 244. b. Yel. 118. 11 Co. 39. a.

(405) Barker *verſus* Cocker.

Somerſetſhire. *Cur. Spir.*

Mich. 18 Jac. Rot. 603.

PEter Barker Vicar of Stower Payne did libel in the Spiritual Court for Tythe-Lambs againſt Robert Cocker, and laid, that there was a Cuſtom there, that all Lambs ingendred, faln and bred upon any one Tenement or living in the ſame Pariſh, although they belonged to ſeveral Owners, they have been caſt, and reckoned together as if they were but one Man's, and the Tenth, or Tythe-Lamb of them ſo counted together have been paid for Tythe.

Lambs of ſeveral Owners reckoned together an unreaſonable Cuſtom. Diſmes, Br. 11.

Whereupon Henden prayed a Prohibition, becauſe all Cuſtoms againſt common Right are triable at the Common Law. Which was granted. And the Court was further of Opinion, that the pretended Cuſtom was unreaſonable, and againſt Law, for by this Means it might fall out, that ſome one might have but one Lamb, and that might be taken for Tythe, and he that had more ſhould pay nothing at all.

(406) Ersfield's Caſe.

Fine.

SIr Thomas Ersfield conveyed to his eldeſt Son (whom he did in effect Diſinherit) the Manor of in the County of for Term of his Life, the Remainder to a younger Son of his, by a ſecond Wife in Fee. Both the Brethren did bargain and ſell their ſeveral Eſtates to Sir Edward Sackvile, and the younger Brother was to have for his Remainder one Thouſand five Hundred Pounds, whereof he received three Hundred Pounds in Hand, and for the reſt he had taken Aſſurance; and then he and his eldeſt Brother acknowledged a Note of a Fine of the Land before me, and then the elder Brother died. Whereupon divers Motions were made for the proceeding and ſtaying of the Fine, pro & contra. And I was of clear Opinion, that the Conuſee might proceed with his Fine, as againſt the younger Brother only, and take his Writ of Covenant accordingly: For the Death of the other is no Impediment; for the Cogniſance of every one is as againſt himſelf, and ſhall work for ſo much as he can paſs. And ſo ſeveral, and accordingly it had paſſed, but that Sir Edward Sackvile was contented that the younger Brother ſhould have the Lands, paying certain Debts of the elder Brother's, and upon other Agreement; ſo the Fine was ſtaped by Conſent.

Winch. 4. 4 H. 7. cap. 24.

5 Co. 39. a.

Motions for proceeding and ſtaying of a Fine.

Fine. (407) Farmer's Caſe.

Dy. 220. b. 5 Co. 30. a. 4 Le. 96. Hut. 135.

ONe Farmer and his Wife acknowledged a Note of a Fine the Twenty ſixth of March, 1621. before Comm. by Dedimus poteſtatem, and the Wife died the Twenty ſeventh Day of the ſame Month. The Twenty eighth Day Compoſition was made in the Alienation-Office upon a Writ of Covenant, made returnable in Hil. Term, before, and the King's Silver was entered in the Office of the King's Silver, as of the ſame Hillary Term, and ſo the Fine was paſſed and engroſſed; and now in Eaſter Term, the Heir of the Wife moved againſt this Fine; but upon Debate the Court reſolved, that the Fine muſt ſtand.

(408)

Tr. 17 Jac. Rot. 2159.

Pannel, Br. 2.

A Party of both Counties of Bedford and Hertford, came to the Bar this Term, and firſt was ſworn one of one County, and another of the other County, and ſo in Order, 'till one of the County of Bedford was challenged, and then the Court proceeded to the next of that County, until one were ſworn, and ſo of the other County, until ſix of each County were ſworn; for if there ſhould be ſix ſworn of one County firſt, and ſix of the other afterwards, it were diſorderly and erroneous.

(409) Wilſon *verſus* Stubs.

Winch. 6. 2 Cro. 520, 583, 623. F. N. B. 267. meſme ca. Hutt. 45. Cr. Jac. 623. Dy. 5. b. 1 H. 5. 5.

MArmaduke Wilſon brought a Writ of ſecond Deliverance againſt Ralph Stubs, and after Verdict, and here at the Bar, An. 18 Jac. had Judgment to recover Coſts and Damages, amounting in the whole to ſixteen Pounds, and had a Capias utlagat. directed to the Sheriff of York, to take the ſaid Stubs in Execution for the ſaid Damages; and after the ſame Term of St. Michael, one Ralph Stubs the Younger, brought a Writ of Indentitate nominis, unto the Juſtices of this Court, and had a Superſed. to the Sheriff to forbear any Execution againſt the ſaid Ralph the Younger. And the Court was often moved to maintain the Writ of Indentitate nominis. And divers Precedents ſhewed in like Writs, brought in Caſe of Outlawry, where one was taken upon a Cap. utlagat. for another of the ſame Name. Vide Paſchæ 36 H. 6. Rot. 411 per Johan. Skyers, de Northbury in Com. Somerſet Junior. ad ſecta. Ro & ſa femme & triel briefe, de Indentitate Nominis, directed to the Judges; and Sureties put in by the ſaid Skyers, qui manuceper. corpus pro corpore. And Iſſue taken by the Attorney General, quod le defend. eſt ead. perſona & venire facias agard, & verdict quod non eſt eadem perſona. And Judgment thereupon, in hæc verba. Ideo conſi. eſt quod præd. Johannes Skiers de Northbury junior, de utlagat. prædict. ſit quiet. &c. & ea occaſione non moleſtetur in aliquo nec gravetur, proviſo ſemper quod ad cap. præd. I. S. de N. Senior tanquam utlagat. procedatur cum effectu, &c. The like Precedent in Mich. 20 H. 7. Rot. 137. upon a Cap. utlagat. Tho. Fuller adverſus Arey & Apres, Iſſue taken by James Hobart, then the King's Attorney General, quod eſt eadem perſona, and Verdict (as before) againſt the King, and the like Judgment. The like in Mich. 3 H. 4. Rot. 214. and a Writ awarded to the Sheriff of London, to enquire ſi eadem perſona, which he did return, that he is not the ſame Perſon, and Judgment as in the firſt.

Br. *Indemptitate nominis.* 3. 11. 1 H. 5. 5. b.

Br. Addition 18. 43. 9 H. 6. 13. b. Dy. 5. b. 9 Co. 69. b. 6 Co. 20. a.

And notwithſtanding theſe Precedents the Court was of Opinion, that the Writ in the principal Caſe, and the Superſed. thereupon was not warranted, but that the Defendant, Stubs the Younger might have his Action of falſe Impriſonment; for that the Defendant being named Ralph Stubs, without Addition, ſhall never be accounted the Younger, but always the Elder of the two of that Name. Nevertheleſs for avoiding of Duplicity of Suits, it was ordered the Defendant Wilſon ſhould appear to the ſcir. fac. upon the Indentitate nominis, and plead to go to Trial, and if upon Trial he was found to be the ſame Man, then the Money remaining with the Sheriff to be delivered to Wilſon, vel contra ſi, &c.

1 H. 5. 5. a.

The

The Court did take agreat Difference between the Caſes of the Outlawry, and the principal Caſe being only at the Plaintiff's Suit, and not at the King's, as in every Outlawry the King is intereſted, and of which principal Caſe no Precedent was, or could be ſhewed. Vide Long, 5 E. 4. fol. 84. 2 Cr. 62.

(410) Clearke *verſus* Gilbert. Caſe.

GOddard Cleark brought an Action upon the Caſe againſt Gilbert for ſpeaking theſe Words; thou art a Thief, and haſt ſtoln Twenty Loads of my Furze: And upon not Guilty, a Verdict was found for the Plaintiff. Now it was moved by Serjeant Hitcham, that theſe Words bear no Action, becauſe the Furze might be ſtanding, and felled and carried away by the Plaintiff, and ſo no Felony. Winch. 3. 2 Cr. 39. Ant. 77. 1 Roll. 52. Cr. Jac. 66, 166. Allen, 7. 2 Ro. R. 300, 440. Jones 11. Pop 152. Hutt. 110. Allen 11, 2 Cro. 442, 457. Ant. 9.

And Athow, of Counſel for the Plaintiff, urged, that it ſhall be underſtood rather of Furze felled than ſtanding, and alſo the Words are ſo coupled that the latter are not made a Reaſon of the former, but either of them a diſtinct Sentence ſtanding of it ſelf; and ſo the Word Thief is ſufficient alone. And to that Purpoſe cited (as he ſaid) divers Caſes, all in B. R. one between Minors and Lightford, 4 Jac. and another between Eire and Ounſtram, 7 Jac. and another between Turner and Campion, 13 Jac. But he relied chiefly upon a Record which was ſhewed, 2 Jac. in the King's Bench, between Kelham and Manſy, where the Words were, thou art a Thief, for thou haſt ſtoln my Corn: And Judgment was given for the Plaintiff. All which notwithſtanding, the Court here, after divers Motions and Debates, gave Judgment againſt the Plaintiff. For as to the firſt Point, it had been often ruled, that it is all one in common Senſe and Acceptance, whether it be (And) thou haſt ſtoln, or (For) thou haſt ſtoln. And in the Caſe of Kelham, the Court denied the Law to be ſo, except there were ſome further Words of Explanation, as Corn in my Barn, or the like. For otherwiſe, in Words meerly indifferent, the more eaſie Senſe, and fartheſt from the more hainous Charge ſhall be taken. And therefore we have given Judgment before, ſupra, between Coote and Gilbert, againſt the Plaintiff, upon Debate where the Words are, thou art a Thief, and haſt ſtoln my Trees. Cro. Jac. 114, 231. 1 Ro. 51. 2 Cro. 39, 442. Winch. 10. Cr. Jac. 457. and haſt ſtolen. Hutt. 113. utra. Mo. 396. 3 Cro. 428. Styl. 115. 2 Cro. 251. utra. Jones, 43. Hutt. 65. Yelv. 34. Accord. Hutt. 65, 113. 2 Cro. 66, 114. utra. 1 Roll. 51. utra. Cr. Jac. 39, 74, 76, 205. 687, 688. Ant. 77. 1 Ro. 52. Allen, 31. 2 Cro. 114, 154, 231, 442.

(411) Hanſon *and* Norcliffe. Debt.

Hill. 18 Jac. 2861.

HAnſon Plaintiff, and Norcliffe Defendant, in an Action of Debt the Plaintiff declares upon a Leaſe for Years made by him to the Defendant, reſerving Rents, and for the Rent behind the Action is brought; the Defendant pleads, that the leaſe in the Count mentioned, was made by Indenture, reſerving the Rent, prout, and with Condition, that if the Rent be behind, then the Leaſe to be void, and doth alledge a Default of Payment of the Rent, and ſo the Leaſe determined. Jones, 9. Entre congeable, Br. 2. Dy. 51. b. Mo. 408. Co. L. 214. b. 2 Cr. 57. 3 Co. 64. b. Syd. 7.

The Plaintiff demurreth in Law, and it was reſolved by the Court, that this Leaſe is not void without a Demand, which therefore the Defendant ſhould have laid actually: And for Want of it, his Plea was naught; and ſo it is at the Election of the Leſſor, and his Heir to continue, or avoid the Leaſe in ſuch Caſe. Demand. 2 Leo. 141. Accord. 1 Ro. 459. 2 Cr. 57. And. 82, 133, 135, 207, 304.

(412) Amphurſt *and* Palmer. Debt.

Paſch. 19 Jac. Rot. 2048.

THe ſame Caſe between Amphurſt and Palmer, was in like ſort reſolved: So the Rent is due without Demand; but the Forfeiture of the Eſtate, neither by Entry, nor by Avoiding upon Condition, is given either for Leſſor or for Leſſee, without due Demand made, which muſt be expreſly laid in Pleading. Demand. Ant. 207, 208.

Brownlow. (413) Mich. 19 Jacobi Regis Rotulo 363.

Winch. 41. m' c' & 110. ceſt caſe quoted. Winch. Ent. 458. Jones, 31. 1 Cr. 543. Latch 66. Ben. 463. 2 Cr. 689. Cr. Car. 435, 524. Jon. 461.

IN an Ejectione Firmæ by William Godfry againſt Tho. Wade. The Caſe as to one great Point was thus.

Mackwilliams the Husband, makes a Feoffment of the Manor of Bathorne, to Osborne, to the Uſe of himſelf and his Wife, and the Heirs Males of their two Bodies, the Remainder to the Heirs Males of the Body of the Husband, the Remainder to the Heirs of their two Bodies, the Remainder in Fee unto the Husband.

They have Iſſue a Son and a Daughter, the Husband dieth; the Son maketh a Leaſe by Indenture to begin after the Death of the Mother, rendring a Rent; and then by Agreement levies a Fine, with Proclamations to the Uſe of himſelf in Fee, and dieth without Iſſue: The Mother, by Aſſent of the Daughter and her Husband, ſuffers a common Recovery, in which the Daughter and her Husband came in as Vouchees: The Uſe of which Recovery is to the Uſe of the Mother for Life, the Remainder to the Daughter and her Husband in Tail, the Remainder in Fee to the Daughter. The Mother dieth.

The Queſtion is, whether this Leaſe of the Son, under whom the Plaintiff Claims, be good againſt the Daughter and her Husband, under whom the Defendant Claims.

And it was adjudged for the Defendant, by the Opinions (upon ſolemn Argument) of Juſtice Jones, Juſtice Hutton, and my ſelf: But Juſtice Winch was of Opinion, that the Fine of the Son, though in the Life of the Mother (before whom he died without Iſſue) ſhould bind the Daughter, and all claiming under her.

Now firſt it is to be obſerved, that the Eſtate Tail to the Husband and the Wife, and the Heirs Males of their two Bodies, after the Death of the Husband, was wholly in the Wife at the Time of the Fine levied, though the Wife were within the Statute of 11 H. 7. Then the Remainder to the Heirs Males of the Body of the Father, was indeed in the Son, at the Time of his Fine levied; but both thoſe Eſtates Tail Were Extinct when the Son and the Mother were dead: So the Leaſe could not ſtand by thoſe Eſtates; Then next ſucceeded the Remainder to the Heirs of the Bodies of the Husband and Wife, which after the Death of the Husband was wholly veſted in the Wife, to which both the Son and the Daughter were Inheritable, being Brother and Siſter.

Now the Queſtion is, whether the Fine of the Brother (being the firſt Iſſue of this Intail) levied in the Life of his Mother (who was ſole Tenant of that in Tail, and did ſurvive him) ſhall bar his Siſter, to whom the Land ſo intailed deſcends immediately from her Mother.

And we held that it ſhould not.

2 Cro. 689. Ant. 258. 1 Cr. 435.

In the Argument of this Cauſe I ſaid, that he that will make a good Conſtruction of the Statute of 32 Hen. 8. muſt make it upon a joint Conſideration and Conference of the Statute of 4 H. 7. and it together, the firſt being the Text, and the other but a Paraphraſe in a few more Words, but little differing in Subſtance; for he that ſhall obſerve the ſtrongeſt Caſes that have been ruled, of giving or binding, barring, extinguiſhing, or diſcharging (to uſe all the Words) of Intails, by Fines with Proclamations ſince 32 H. 8. ſhall find that the ſame Caſes ought to have been ſo ruled upon the Statute of 4 H. 7. though the other of 32 H. 8. had never been made: But becauſe Intails were ſo beloved, and had reigned ſo long, it was wiſely done of the Judges not to launce the Sore too deep of themſelves, but to have the Parliament Authors of ſo liberal an Expoſition as 4 H. 7. required, and would well have born. And therefore, 32 H. 8. makes all Fines, as well before as after, levied according to 4 H. 7. to be of one and the ſame Force and Effect. So the Fines upon 4to. are, ab initio, as ſtrong againſt Intails, as 32o. And in two Caſes the Statute of 32 H. 8. ſeemed to weaken the Statute of 4 H. 7. In the Caſe of Fine by Tenant in Tail by Act of Parliament, and Tenant in Tail with Reverſion in the Crown. For P. 28 H. 8. Fine by Tenant in Tail, the Reverſion in the Crown, bound the Iſſue by 4 H. 7. and 32 H. 8. provides, that the ſame Statute ſhall not extend

3 Co. 90. b.

Dy. 32. p. 8.

to

to Fines levied by Tenant in Tail, the Reversion in the Crown, but that the same shall be of the like Force as they should have been, if that Act had not been made, which amended not their Case; whereupon in Stafford's Case the Judges devised to help that slip by a very oblique and indirect strain upon the Statute of 34 H. 8. of common Recoveries, whereby it was provided, that no common Recovery in that Case should bind the Issue, but that he might enter after the Death of the Tenant in Tail, the said Recovery, or any other Thing done or suffered, by or against any such Tenant in Tail, to the Contrary notwithstanding. Co. lib. 8. 78. Stafford's Case, and Notley's Case.

1 Syd. 165. 1 Inst. 373. a. 1 Cro. 430. 4 Leo. 40. Mo. 467. 3 Cro. 595. 2 Roll. 773. Savil, 105.

All Persons are by 4 H. 7. concluded under the Words Privies and Strangers to the Fine, and the Statute hath Savings for Strangers; but none for Privies; and therefore the Exception of Partes Fines, &c. is given to all Persons, not Parties, nor Privies; that is, only unto Strangers.

The Word Privies, in the Purview of 4 H. 7. is the operative Word, and contains as much as the many Words in 32 H. 8. And therefore no Man would have doubted upon that Law, of Grant's Case, Archer's Case, or Zouch's Case, for they are all Privies to them that levy the Fines, that is, Privy in Estate and Title to the Intail; for Privity in Blood alone is nothing; and therefore Cook lib. 3. Lincoln Colleges Case, if a Daughter of a Tenant in Tail levy a Fine, and then a Son is Born, Proclamation shall not bind him, for he is a Stranger, and may plead as a Stranger, Partes nihil, &c But in Archer's Case, where the Grandfather and Grandmother were Tenants in special Tail, and the Grandfather dies, and the Father enters upon the Grandmother, and levieth a Fine, and then the Father dieth, and after that the Grandmother dies; I hold, that the Son is to be barred by his Father's Fine. For though in the Formedon he need not make himself Heir in Tail to his Father, because he was never seised, yet he must of Necessity, being a Lineal Heir, mention him, and must convey himself to the Intail by and through him; which is the Reason given in this Case of 18 Eliz. Dyer 351. that the Fine of the Husband, Tenant in special Tail, doth bind the Issue though the Mother survive.

Ant. 258. Dy. 3. a. 3 Co. 90. a. 3 Cro. 122, 610. 3 Leo. 211. 10 Co. 50. a. 3 Co. 61. b. 1 Cro. 435. Winch. 42. Accord. 3 Cr. 435, 525, 543. Ant. 258. Mo. 252. Jones, 33. Pl. 17. Mo. 147.

But now in Fines amongst Collateral Issues, and Heirs among themselves, which is the Case now in Question, the Case is not the same, but it receiveth Distinction according to Contingency; for it is not necessary that the collateral Issue claiming by an Intail, must make mention of every collateral Issue inheritable before him, as in the Case of Lineal Ancestors it is.

And therefore make the Case that the Father being Tenant in Tail to him, and the Heirs Males of his Body have Issue three Sons, and the second Son levy a Fine in the Life of the Father, and then the Father die without disposing the Estate.

Discent Fitz. 15. Ant. 258.

First, clearly the eldest Son is not barred, because he is not a Privy to his second Brother, though he be within the Rigour of the Words; for he is Heir to him that levied the Fine, and doth claim only by the Intail; but above him, and not as Heir, which is the Meaning of the Law.

Then again, if the second Brother die without Issue, in the Life of the Elder, or of his Issue, the third Brother shall Claim this in Tail after the Death of the elder Brother, notwithstanding the Fine of the middle Brother, because he doth Claim immediately from his elder Brother, and need not to convey himself by, nor make mention of his middle Brother, no not in his Pedegree. But if the elder Brother die without Issue, in the Life of the middle Brother, or his Issue, without disposing the Estate, and then they all die; now the third Brother and his Issue shall be barred; for though he may bring his Formedon in Descender, and lay down the Intail, and then bring it to his eldest Brother that was last seised, and make himself immediate Heir unto him, without Mention of the second Brother; yet the Tenant in the Formedon may plead the Fine of the middle Brother, and that he or his Issue, did survive the Elder and his Issue; for by that it appears, that the middle, or his Issue, were the Persons inheritable to the Intail before the younger Brother, in whom the Title of the Intail had been totally, but for the Fine

1 Cro. 435, 543. Jones, 34. Mo. 252. Ant. 258.

Fine which bars him, and the whole in Tail, as well againſt his younger Brother as againſt his own Iſſue. By which it appears that the Fine bars or bars not the younger Brother, by Contingency of Survivor, or not Survivor of either Party. Whereof the Reaſon is, that if after the Fine of the ſecond Brother, the Elder had died without Iſſue, and the Father had died, the whole Tail had been bound againſt all the Brethren in the ſame Manner as it were upon a Fine againſt the Brethren in Fee-ſimple.

Dy. 3. a. And indeed the Scope of the Statute 4 H. 7. and 32 H. 8. is to make Fines with Proclamation, bar as amply in Tails, as in Fee-ſimples.

But in all theſe Caſes, though their Fines bind theſe Privies, yet Strangers may ſave themſelves and their Right by Plea, Partes finis nihil, &c.

Co. L. 8. a. Jones, 34. 1 Cr. 435. Note, that this Difference between Lineal and Collateral Heirs is well verified upon the ſame Reaſon, 32 H. 8. Dyer 48. that if a Man be ſeiſed of Lands in Fee-ſimple, and his eldeſt Son be attainted of Felony, and die in the Life of his Father without Iſſue, the ſecond Brother ſhall inherit immediately from the Father; otherwiſe it will be if the Elder Brother, or his Iſſue, ſurvive the Father.

Error in Exchequer Chamber.

(414) Lord Sheffeild *verſus* Ratcliffe.

13 Jac. Scacc. Rot. 96.

Ben. 166. Jenk. Cent. 286. Pal. 351. Jones, 69. Godb. 300. Herley 150, 152. Cr. Car. 427. Roll. 2d R. 312, 333, 416, 426, 496, 501. 2 Ro. R. 312, 333, 374, 416, 428, 496, 501. 12 Co. 6. 1 Cr. 431. 3 Inſt. 19.

DIe Mercurii poſt Feſtum Sanctæ Margaretæ 17 E. 2. John de malo Lacu, gave to Peter de malo Lacu, and the Heirs of his Body, the Caſtle and Manor of Mulgrave. By many mean Deſcents the Land came to Sir Ralph Bigod, January 10. 6 H. 8. Sir Ralph Bigod made a Feoffment to William Ewer and others, to the Uſe of his laſt Will, and died; and the Right of the Land, together with the Intail, the Uſe alſo after the Will performed, deſcended to Sir Francis Bigod.

December 10. 21 Hen. 8. Sir Francis Bigod made a Feoffment to John Conyers, and others, to the Uſe of himſelf and Katharine his Wife, and the Heirs of their Bodies, and they had Iſſue Ralph Bigod and Dorothy.

Then the Statute of 26 H. 8. cap. 13. of Forfeiture for Treaſon, is made. 16 Maii, 29 H. 8. Sir Francis Bigod was attainted of High Treaſon, committed 7 January, 28 Hen. 8. and was executed, and Katharine ſurvived, 31 H. 8. the ſpecial Act of Attainder of Sir Francis Bigod, and his Forfeiture, amongſt others, is made.

Novemb. 4. 6 Eliz. Ralph Bigod, Son of Francis and Katharine, was reſtored in Blood by Parliament, and died without Iſſue, Dorothy married Roger Ratcliffe, and they have Iſſue Francis Ratcliffe.

Octob. 1. 8 Eliz. Katharine died, and Francis Ratcliffe entered Aug. 11. 33 Eliz. the Office found for the Queen.

February 1. 34 Eliz. Francis Ratcliffe died, having Iſſue Roger Ratcliffe.

Apr. 28. 34 Eliz. the Queen by her Letters Patents of the ſame Date, granted the ſame, &c. to Edmund Lord Sheffeild, and the Heirs Male of his Body begotten, at the Rent of 90 l. 18 s. 3 d.

Roger Ratcliffe upon this whole Caſe, ſued his Man. de droit in the Exchequer, and had Judgment for him. Whereupon a Writ of Error was brought. And the Queſtion is, whether this Judgment ought to be affirmed or reverſed.

The Queſtions are two.

The firſt Queſtion. First, whether Francis Bigod, who had an Eſtate in ſpecial Tail in Poſſeſſion, had alſo any Right of the old Intail left in him at that Time of his Attainder. Or whether it were not in him, but in Abeyance, in reſpect of the Feoffment made by him, 21 H. 8. And whether that Right did accrue unto the King by the Attainder of Francis Bigod, and the general Statute of 26 H. 8. cap. 13. or by the particular Act of 31 H. 8.

And I am of Opinion, that there was a Right of the old Intail remaining in him, and that the King ought to have it, together with his Eſtate Tail ſpecial in Poſſeſſion, freed and diſcharged thereof, as long as the Eſtate in Tail endures.

In

In the handling of this Point, I ſhall occaſionally ſpeak of Rights of Entry that are given or not given, and alſo of Rights of Actions real, given or not to the King upon Attainder of Treaſon, by force of the Statutes, or of the general Statute of 33 H. 8. Chap. 1. for this Statute is ſo near of kin to that Conſtruction of the Word (Rights) that we muſt foreſee that we do not in the Judgment of this Caſe prejudice the Statute Ex obliquo.

The ſecond Queſtion is, whether there be a Remitter in the Caſe after Attainder of Treaſon; and if there be ſuch a Remitter, then when the Remitter begun, who, and in whom (whereof nothing hath been diſtinctly ſaid yet.) And I am of Opinion, there ought to be no Remitter in this Caſe to the old in Tail. The ſecond Queſtion.

And thirdly, I add further, that if there be any Remitter, it is but for a Time, and by the Office following it is removed and ended.

I muſt Profeſs, that whenſoever I have thought of this Caſe, and adviſed upon it my ſelf, I have met with two ſtrong Affections, Zeal, and Indignation: Zeal in Behalf of the King, to preſerve the ancient Right of the Crown, againſt the Invaſions of Rebels and Traitors: Indignation, when I find Francis Bigod, that ſometimes brought a puiſſant Army into the Field to depoſe the King, failing in that Enterprize, now to riſe up in Judgment againſt him, that whom he could not by the Sword deſtroy, he might ſupplant by the Law: For though Ratcliffe bear the Name of this Caſe, yet I ſee nothing but the Land of Francis Bigod, his State, his Right and Title, his Blood, his Deſcent that maintains it and defends it. Therefore let it not ſeem ſtrange that I am warm in this Caſe, for, Zeal and Indignation are fervent Paſſions.

And I do confeſs to give Prerogative to the Right of the Crown in my Care and Vigilancy: And it is Nobile officium Judicis & debitum, due by Oath and Office to watch for him who wakes for us, ne quid detrimenti capiat Reſpublica. And if Charity begin at it ſelf, ſo ought Juſtice to do, that the King, who granteth Juſtice to all, ſhould not be wanting to himſelf.

Becauſe I deſire to be plain and clear in my Argument, I will make the Queſtion as ſingle as is poſſible: For, multiplex indiſtinctum parit confuſionem, & quæſtiones ſimpliciores eo lucidiores.

Therefore I will make the firſt Point a ſingle Queſtion (as the worſt for my Part.) But this, Tenant in Tail, of Land in Poſſeſſion, makes a Feoffment in Fee. The Queſtion is,

Whether any Right of Intail remain in himſelf ſtill againſt his Feoffment, and to what End and Uſes, and what he may do or ſuffer by force of that Right. 1 Point. Co. L. 269. a. b.

In this Queſtion you ſee I do ſhun to take any Exception to the Validity of the Feoffment made, by Francis Bigod, as ceſtui que uſe in Tail by the Statute of 1 R. 3. and not then Tenant in Tail in Poſſeſſion. Jones, 112. 2 Ro. R. 316.

Yet notwithſtanding, taking the Cauſe at the worſt, I am of Opinion clearly, that this Feoffment gives away all the Eſtate the Tenant in Tail Feoffor had, as concerning himſelf, or any Benefit that he may receive. But as concerning his Iſſue inheritable to that in Tail, and to him in the Reverſion, and for their good there remains ſtill in him a Right of that in Tail, by force of the Statute of Weſt. 2. for the good of thoſe that are ſaved by that Statute, againſt his Alienation. Lit. Sect. 694. 3 Co. 87. b. Plo. 556. a. 560. b.

Therefore note firſt, that it is confeſſed on both Sides, that there is a Right remaining for their Uſe and Good; but whether it be the Feoffor himſelf, ſleeping 'till their be an Heir to claim, or in no Perſon, but in the Preſervation of the Law, which ſome term in Abeyance, or in Nubibus, is the Queſtion. By which it appears, that the pretended exact Enumeration of Rights, as Jus habendi, retinendi, percipiendi, poſſidendi, Intrandi, recuperandi & fruendi was needleſs. Whereupon they would infer that this was no Right, becauſe it was none of thoſe Rights, and makes but Muſter and Noiſe, for there is a Right, and it is Jus recuperandi, when the Time cometh. But where it is in the mean Time 'till the Perſon inheritable appear, that may put this Right in Execution and Practice, which the Feoffor cannot do againſt his own Feoffment, is the only Queſtion: And upon this pretended exact

exact Diviſion of Rights, they have left out the whole Member of Rights; for where Rights are in a Dichotomy, either Jura lucrativa, or Jura lucrandi, acquirendi, or Jura alienandi, they have left out that whole latter Branch, and only particularized the Jura lucrandi.

So all the Ways and Powers and Rights, whereby a Man hath Right and Power to depart with that he hath, and not to get or keep, are omitted: Such as are the Rights to give, to releaſe, or extinguendi, to extinguiſh, jus renunciandi, to renounce or diſclaim. Of which kind, this very Right that the Tenant in Tail hath after Feoffment, (which hath but diſcontinued) finally to bar the whole in Tail, is one. For this Right that is left after his Fine or Feoffment, he may extinguiſh, and by that Right the Tail may be recovered again, as by the Root of the Intail that is left alive ſtill.

3 Co. 90. a. Poſt. 338.

Now ſee the Reaſon of this, and let the Statute of Weſt. and the Pleading and Practice upon the Statute, which are Expoſitors of Law, judge.

The Statute of Weſtminſter recites the Forms of Fee-ſimples conditional, which now are Intails, and then ſheweth two Miſchiefs: That in all theſe Caſes, the Feoffees after Iſſue, had Power to alien and diſinherit their Iſſue, and alſo the Donors were likewiſe heretofore barred of their Reverſion, both being againſt the Minds of the Giver, and Form of the Gift, and holden hard, Durum videbatur, &c. Durum id eſt iniquum; and the Remedy provided, is only in theſe Words.

It is ordained, that the Will of the Giver (according to the Form in the Deed of Gift expreſſed) ſhall be henceforth obſerved. So that they to whom the Land was given under ſuch Conditions ſhall have no Power to alien it, but that it ſhall remain to their Iſſue after their Death, or ſhall revert to the giver for want of Iſſue.

And if a Fine be levied of ſuch Lands, Finis ipſo jure ſit nullus, he ſhall have no full and abſolute Power to alien or levy a Fine. But though neither Fine nor Feoffment be void, yet they ſhall be voidable, not as before, when they bound abſolutely both Heirs and Donors.

So that it appears, that whereas before this Statute, the Feoffees had abſolute Power to alien after Iſſue, and finally and totally, and in a ſort rightfully, being in a ſort not againſt any Rules of poſitive Law, to bar to all Purpoſes, as well againſt his Iſſue and the Giver, as againſt himſelf. Now, that very Power of Alienation remaining as againſt himſelf, is reſtrained and weakned, to do that that finally ſhall bar his Iſſue, or the Giver expreſly, and him in the Remainder, by Equity, though he may ſtill diſturb and diſcontinue it againſt them by Expoſitions, which the Statute hath received, which, as Littleton ſaith, Ch. 71. Diſcont. reaſoning out of the Writ, which ſaith, a Tort luy de force, is a wrong and wrongful Act: So that whatſoever conduceth to Recovery of the Iſſue, or the Giver, he is reſtrained of his Power, that he had before to bar it.

3 Co. 89. a.

So upon this Statute I reaſon thus. A Tenant in Tail hath the whole Eſtate in Tail, and all the Right of it in himſelf, and may finally and totally bar it, as well againſt his Iſſue as againſt himſelf by a common Recovery, notwithſtanding this Statute, but by a Feoffment or Fine he could not, by reaſon of this Statute.

And therefore, that chief and meer Right, ſummum or merum jus in Tail (which though it be diſcontinued, is not barred by the Feoffment) remained where it was not aliened (ſc.) not made alienum; for it is not in his Power, by that kind of Conveyance, and a non poſſe ad non eſſe ſequitur argumentum neceſſarie negative, though not affirmative; that which cannot be done is not done; ſo that the Argument ſtands thus; what the Tenant in Tail had, and hath not parted withal, remaineth in him ſtill; but the main Right in Tail he had, and hath not parted withal; therefore it remaining in him ſtill. For Qui non habet poteſtatem alienandi, habet neceſſitatem retinendi. If you ſay he hath parted with all, I prove he hath not, becauſe the Statute hath taken from him the Power to do it by Fine or Feoffment; only, Finis ipſo jure ſit nullus, which before he could have done.

Now

Now the Practice of Law hath been anſwerable to this, both towards the Donor and towards the Iſſue. The Donor hath two Things wherein he may be benefited or prejudiced: one in his Rents reſerved upon his Gift, the other in his Reverter the Iſſue only in his Diſcender. Now for the Donor, when the Donee hath made a Feoffment and hath excluded himſelf from the Uſe of all Rights as concerning himſelf, yet the Donor ſhall by Force of the Statute, which he could not at the Common Law, avow upon him ſtill, as the Tenant of the Land, 48 E. 3. Co. L. 269. a. Lit. Sect. 455. Plo. 561. a. 3 Co. 30. a. 1 Cr. 428.

And if the Donor will releaſe all his Right in the Land to the Donee, that hath diſcontinued, this Releaſe, tho' it will extinguiſh no Right to the very Lands, yet it will extinguiſh the Rents, which proves that the Donee cannot by his Feoffment diſmiſs himſelf of his whole Right, but that by the Statute of Weſtm' his Alienation is diſabled as to that, as concerning the the Donor, which is by the Equity and Meaning of the Statute, in the Point of Avowry for Rent. But whenſoever the Tenant in Tail ſuffers a Recovery, or levies a Fine, at this Day, the Avowry together with the Right of the Entail will ceaſe. 3 Co. 29. b.

And the Anſwer as to that is imperfect, to reſemble it to the Caſe of a Tenant in Fee-ſimple, that doth alien, and yet the Lord may ſtill avow upon him. For the Caſes have no Reſemblance: For as Littleton well diſtinguiſheth, That Tenant in Fee-ſimple, when he hath departed with his whole Eſtate is no longer Tenant to the Lord in Right, neither can he compel the Lord to avow upon him, tho' the Lord may if he will avow upon him for his Arrearages. And if the Lord releaſe unto him all his Right in the Land, the Releaſe is void to diſcharge Rents and Services, in all which it differs materially from the other Caſe, and is no other but a Caution and Proportion of Law, that as the Tenant is to be made acquainted when the Lord aliens the Seigniory, ſo the Lord is to be made acquainted when the Tenant aliens his Tenancy, and all Arrearages paid, that he may have no After-reckonings with his new and old Tenant, when the Land that ſhould yield it is gone. And when Notice is given, and the Arrearages paid, the Avowry vaniſheth. Co. L. 269. b.

Now for the Heir in Tail, claiming from his Anceſtor after his Feoffment by Deſcent from him, thereby allowing a Right to remain in him againſt his Feoffment, the Caſe is the more obſcure, becauſe during the Life of the Feoffor, there can be no Motion of that Right, neither by the Feoffor, who hath barred himſelf, nor his Iſſue, becauſe the Right is not yet deſcended: Yet let me put a Caſe upon the Statute, 11 H. 7. upon the Opinion of Montague, Chief Juſtice, that if a Wife Tenant in Tail Jointreſs make a Feoffment, the Perſon to whom the Land ſhall belong after her Death ſhall enter, and hold it according to his Right. Now till ſuch Entry the Diſcontinuance remaineth, and the Avowry ſhall be upon her. But when the Iſſue enters he is in as Heir in Tail & quaſi by Deſcent, even in the Life of the Tenant in Tail of the very ſame Eſtate, and Right in Tail that was in the Mother, by Force of the Act of Parliament. And therefore the Avowry ſhall be upon him. 11 H. 7. cap. 20. 3 Co. 30. b.

But now generally, when the Tenant in Tail hath made a Feoffment, and dies, his Heir ſhall bring a Formedon in Deſcender, and ſhall ſay in his Count Deſcendit jus from the Anceſtor to him, as Heir, per formam doni. And the Anſwer to the Objection is alſo imperfect, to ſay that the Deſcendit jus is but as much as Devenit jus, for that is to confound Propriety of Phraſe, and Diſtinction of Caſes, which in Writs and Counts eſpecially is moſt apt and curious: For to ſay Devenit jus, is a Word common in Caſes of Deſcent or Reverter or Remainder, and may ſerve common People in ordinary Speech, as in this very Statute is ſaid, that the State ſhall remain to the Iſſue after the Death of the Anceſtors, or revert to the Donor, 2 Cro. 428. Plo. 560. b. 1 Cr. 428, 341, 430.

And when you ſpeak of Writs, Devenit jus will ſerve no Writ or Count of Formedon one or other. And any other Form improper will abate the Writ. It is true that regularly a Feoffment bars the Feoffor of all preſent Rights, yea, and of all after Rights and Poſſibilities ariſing to the ſame Parties by Cauſes before the Feoffment, and that without reſpect to the Acts of Strangers. Vide Albany's Caſe and Digg's Caſe. Co. Lib. 1. Co. L. 30. b. 338. a.

And therefore in Archer's Case, Co. lib. 1. fol. 66. Land was devised to the Father for Life, the Remainder to his first Heirs Male. The Tenant for Life made a Feoffment in Fee and died, the next Heir was barred of his Remainder for ever. For by the Feoffment, the Estate for Term of Life was so bound, that the Remainder could never arise during that Estate, and so must fail.

Co. L. 30. b. 3 Co. 87. b. Dy. 3. b.

And 9 H. 7. 1. A Man seised of Land in the Right of his Wife, makes a Feoffment in Fee, and then the Estate is made back to the Wife, she is thereby remitted, and yet he shall never be Tenant by Curtesy. And therefore it is well resolved, that if Tenant in Tail discontinue, and the Discontinuee levy a Fine with Proclamations, he that did discontinue is not bound to Claim, but after his Death his Issue must. For the Discontinuor hath no Right. First, for himself, for so he must claim, and he cannot be blamed, or suffer for Default of Claim, when it was not in his Power to make Claim. And therefore all Cases that are put to prove the Force of a Feoffment, regularly conclude nothing against this Opinion, That the Tenant in Tail by his Feoffment, cannot put away his whole Right of Entail, because that the Statute of Westm' forbids it, which over-rules all private Acts and Rules of Law.

But this Case is irregular, because it standeth by Act of Parliament, which is able to make the same Act good to one Purpose or Person, and void or voidable to another, as the Statutes of Bishops, Deans, Chapters, and the like, which bind the Predecessors, and are void and voidable against the Successors, who shall nevertheless when they enter, be in by way of Succession. And that there is still a Right in the Tenant in Tail against his Feoffment appears, in that he hath still Power to bind it more finally and totally by Fine or Recovery if he pursue them rightly; and therefore note Cupledike's Case, Co. lib. 3. fol. 6. If Tenant in Tail with divers Remainders over make a Feoffment, and the Feoffee vouch not the Feoffor Tenant in Tail in Possession, but the first in Remainder, his State (i. e) the Feoffor is not barred, but stands to be remitted, or recovered. And Mansel's Case is there cited, and allowed for a Bar to three several Entails, by one Recovery with a double Voucher.

Ant. 26.

3 Co. 90. a. Ante 336 Plowd. 8. Manxell's Case.

And this is the Jus extinguendi which I spoke of before, which he could not extinguish nor discharge, if it were not in him and his Power still.

And therefore there is no Cause to frame Abeyances needless and in vain, which the Law loves not, nor admits, but in Case of Necessity; as in Vacations of Bishops, Parsons, and the like, or Remainders to right Heirs upon Freeholds. Abeyances are not allowed but where the original Creation of Estates requires them, or where the Consequence of Estates, and Cases do in Congruity require them.

Co. L. 342. b.

As for the First.

In the Case of single Corporations, Bishops, Deans, Parsons, and the like, which must die, and leave a vacuum of Freehold, or a Remainder to the Heirs of I. S. yet living with Provision for the present Freehold.

7 Co. 9. a. Ante 222. Co. L. 390. a. 265. b.

Or secondly in Cases of Congruity, if a Man have given Warranty, and die without Heirs, his Heir may be vouched in utero Matris: But if there be no Heir in esse, he shall be vouched, 38 E. 3. 29. And a Vouchee may take and plead a Release quasi tenens, Littleton cap. Releases, or may levy a Fine to the Demandant of the Land in Question. But for States that are of their own Nature, in their Original perfect and entire, (as this is) the Law permits not vain affected Abeyances, or Fictions, by the voluntary Act of the Party, that serve to no Good, as this, which should be to preserve a Right to serve the Heir, and to defraud the King; which is one of the principal Reasons which moved the Statute of 27 H. 8. to confound Uses into Possessions, Uses being but a kind of Abeyance and Shift to keep the Profits to the Cestui que Use, and to defraud the King and Lords of their Escheats, and them that have Right to demand of their Actions.

Ante 153.

Littleton was confounded in himſelf that made an Abeyance of a Grant of Totum ſtatum ſuum, and yet made it but an Eſtate for Life, which is condemned in Walſingham's Caſe by the Judges. 2 Co. 51. b. Co. L. 345. a. Sect. 650. 1 Co. 135. b. Plo. 560. b.

And again, although Fictions may take place among common Perſons, yet the King is not to be anſwered, bound nor defeated by Fictions: And therefore the King will not be bound in his Reverſion or Remainder by Recompence fained upon a Common Recovery, 6 E. 3. 56. Warranty Collateral binds not the King, without true and actual Aſſets; nor by Eſtoppels, &c. of his own Recitals ex certa ſcientia. Alton Wood's Caſe, Co. l. 1. 43. Co. L. 370. b. Herl. 156.

17 E. 3. The Archbiſhoprick of York voided, during which Avoidance, the Deanery alſo voided, which hath been always Elective, yet the King ſhall preſent in Right of the Biſhoprick, as the Right was at the beſt. If you have a Right for the Good of the Iſſue, the King will alſo find it for his good. The King ſhall take Things at the beſt for himſelf. The King's Tenant preſents and inſtitutes, and before Induction dies, the King ſhall preſent of new, though the Heir could not in whoſe Right he ſeems to do it. Ant. 154. Plo. 528, b.

3 E. 6. Dy. 68. Stringfellow ſued an Extent upon a Statute Staple againſt one Brownſop; the Sheriff of Bedfordſhire extended the Land; and praiſed the Goods, and ſeiſed them in the King's Hands: But before Liberate, an Exchequer Writ for a Debt of an hundred Pounds of the King's to be levied upon Brownſop, came to the Sheriff, who returned upon the Writ this ſpecial Matter into the Exchequer, and that he made the ſame Return into the Chancery, upon the Liberate; and that there were no other Goods, yet he was enforced notwithſtanding the Cuſtody of Law, to ſerve the King. 1 Cro. 149. Jon. 202. Dy. 676.

So the Caſe of Sir Edward Cook, in the Court of Wards, Sir Chriſtopher Hatton made a Conveyance to the Uſe of himſelf for Life, the Remainder to Sir William Hatton alias Newport in Tail, with Clauſe of Revocation; and after became indebted to the Queen. It was reſolved that the whole State of his Land, though not revoked, was ſubject to the Debt by Common Law, without Averment of Fraud under the Inquiſition Quæ terras & tenementa habuit. 2 Ro. R. 294. Godb. 289. Jenk. Cent. 285. 8 Co. 171. a. Ante 45. 10 Co. 55. b. 11 Co. 92. b. Plo. 321. a. 261. a. 263. b.

Then follows the next Queſtion, Whether ſuch a Right of Formedon may be forfeited to the King by the Statute, (for by the Common Law it cannot be) or what Rights of Entry, or of Action in general may be forfeited by the Statute, either in Nature of Grant, or in Nature of Extinguiſhment.

It is objected in general, firſt, That Rights were neither meant nor mentioned in the Statute of 26 H. 8. Object.

Next, becauſe the Forfeiture of Entail Eſtates, in Poſſeſſion themſelves, was gained upon the People by Circumvention, without naming of them. And therefore they thought it unſafe, to add or name Rights, leſt they ſhould have awaked the Parliament, and a Law ſo gotten by Art, would not be extended beyond the Letter.

The Words of the Statute, 26 H. 8. cap. 13. are theſe. Be it, &c. that every Offender and Offenders, being hereafter lawfully convict, of any Manner of High Treaſon, by Preſentment, Confeſſion, Verdict or Proceſs of Outlawry, according to the due Courſe and Cuſtom of the Common Laws of this Realm, ſhall loſe and forfeit to the King's Highneſs, his Heirs and Succeſſors all ſuch Lands, Tenements, and Hereditaments, which any ſuch Offender or Offenders ſhall have, of any Eſtate of Inheritance, in Uſe or Poſſeſſion, by any Right, Title or Means, within this Realm of *England*, or elſewhere, within any the King's Dominions at the Time of any ſuch Treaſon committed, or any Time after, ſaving to every Perſon or Perſons, their Heirs and Succeſſors, other than the Offenders in any Treaſon their Heirs and Succeſſors, and ſuch Perſon and Perſons, as Claim to any their Uſes, all ſuch Right, Title, Intereſts, &c. which they ſhall have at the Day of committing ſuch Treaſons, or at any Time before, in as large and ample Manner, as if this Act had never been had or made.

The ſpecial Act of 31 H. 8. being alſo in this Caſe, is not reſtrained to any Form of Attainder, as is 26 H. 8. And it hath the expreſs Words of all Lands, Tenements, Rents, Reverſions, Remainders, Rights, Poſſeſſions, Entries,

Conditions, *cujuſcunque naturæ, qualitatis aut nominis*, which the Perſon attainted, or any other to their Uſe, had in Fee-ſimple, or Fee-tail, and hath a Saving as the other, and a Proviſion that his Attainder ſhall not prejudice ſuch to whoſe Uſe he was ſeiſed.

The Statute of 33 H. 8. chap. 20. ſaith thus, That the King's Majeſty, his Heirs and Succeſſors ſhall have as much Benefit and Advantage by ſuch Attainder, as well of Uſes, Rights, Entries, Conditions, as Poſſeſſions, Reverſions, Remainders, and all other Things, as if it had been done by Authority of Parliament, and ſhall be judged and deemed in actual and real Poſſeſſions of the Lands, Tenements, Hereditaments, Uſes, Goods, Chattels, and all other Things of the Offender ſo attainted, which his Highneſs ought lawfully to have, and which they ſo being attainted, ought or might lawfully loſe and forfeit, if the Attainder had been done by Authority of Parliament, without any Office or Inquiſition to be found of the ſame, any Law, &c.

This Statute 33. H. 8. hath no better Words for the Rights and Things forfeited than 31 H. 8. and hath no Name of Entails, only it giveth to the King the preſent Poſſeſſion.

Solut. And now out of the Conſideration of theſe Statutes I anſwer, That the Pretence objected is neither honourable nor true; for the Statute 26 H. 8. it ſelf ſpeaketh plain, that the Party attainted of Treaſon ſhall forfeit all his Lands, &c. of any Eſtate of Inheritance, and there were but two Eſtates of Inheritance, (viz.) Fee-ſimple, which was forfeitable by the Common Law: And therefore the Statute could work upon nothing but Entails, and this was full and direct, and not by general and ambiguous Words, as Trugdin's Caſe, cited by Cook, and Foſter's Caſe, which was but in theſe Words, That a Perſon attainted in a Premunire ſhall forfeit all his Lands and Tenements, Goods and Chattels to the King, but ſaith not of what Eſtate. Again that Statute of 26 H. 8. gave Churchmen Power to forfeit Land of their Churches, by the Words ſeiſed of Inheritance by any Right, Title, or Means whatſoever, which had leſs Power in Juſtice both of Law and Equity, to make Devaſtations of the Inheritance of their Churches, than the Tenant in Tail of his. And to ſhew plainly that the Statute proceeded unmask'd, it did expreſly create new Treaſons of inferior Nature, holding of Forts, Shipping and Munition. A Thing whereof the People were ever ſo extreamly jealous, that they forbad upon the Law of 25 E. 3. to all Judges to do any Thing that Way: Reſerving that as a Peculiar to themſelves in Parliament, in theſe Words thus. Becauſe many like Caſes of Treaſons may happen, which a Man cannot think of; it is accorded that if any ſuch happen, the Judges ſhall tarry without Judgment, till the Caſe be declared in Parliament. *Tuta eſt Cuſtodia quæ ſibimet creditur.*

11 Co. 63. b. Co. L. 391. a. 1 Cr. 10. 172. 1 Inſt. 130. a.

And touching the Word Rights, though 26 H. 8. hath not the Word Rights in the Purview, yet it hath the Word Rights expreſly in the excluding of the Offender and his Heirs, out of the Saving, which was enough to awaken them. But beſides that, the ſpecial Act of 31. hath all the Words, Rights, Poſſeſſions, Entries and Conditions expreſly in the Purview, as hath been obſerved.

But on the other Side, if a Man would recriminate, judge whether the Statute of Entails it ſelf did not gain upon the King's Exemption from Forfeitures for Treaſon, by general and cunning Words. For there is no Word of Treaſon, nor Word of any Kind, but only Non habeant poteſtatem alienandi; as if they had ſought only to ſave Eſtates Tails from Grants and Sales.

2 Inſt. 334.

For Edward the Firſt was too prudent and magnanimous a Prince, to have given Aſſent to a plain Statute, that the Eſtates, which then were ſubject to Forfeiture of Treaſon, ſhould be exempted by a new Name of Tail, being in Effect the ſame Eſtate that was before.

But now it is controverted what Rights are made forfeitable by this Statute of 26 H. 8. or by the ſpecial Act of 31 H. 8. or by the general Statutes of 33 H. 8.

And this is a Point of great Conſideration, not ſo much for this particular Caſe, as for the General of all Forfeiture of Rights, in all Caſes of Treaſon whatſoever, and upon all Statutes.

And firſt it is granted on the other Side, that Right of Entry is forfeited, but Right of Action not. And ſo they urge the Warrant of the Marquels of Wincheſter's Caſe, Co. l. 3. and Doughty's and Engleſield's Caſe; and then again they reſtrain the Right of Entry, to the Entry by a Diſſeiſee upon the Diſſeiſor, by the Rule of Imitation of Attainder at the Common Law, that gave no other. In which Caſe the Lord could not have an Aſſe; for the Privity that is in Action.

But now I hold, That where new Remedy is given by Entry, which was not before Action, the King ſhall have them by the Word Entries, upon the Statutes of 31 & 33 H. 8. And therefore I put the two Caſes upon the Statute of 32 H. 8. cap. 28. of Entry given to the Wife upon the Feoffment of Fine of her Husband, and the other upon 31 H. 8. cap. 33. the Entry of the Diſſeiſee upon the Heirs of the Diſſeiſor, dying within five Years after the Diſſeiſin: The King ſhall have thoſe Entries in both, but not by the Statute of 26 H. 1. to 31 H. 8. But by the Statute of 33 H. 8. which gives Entries by ſeveral Words. Which 33 H. 8. was made after thoſe new Remedies by Entries given. But the old Action of Cui in vita, or Entry ſur Diſſeiſin is not given. And the Entry of an Heir upon a Jointeres's Diſcontinuance upon 11 H. 7. is alſo given by 31 & 32 H. 8. For I will never ſhorten the King's Rights where Juſtice bears it; that is, where the King hath the Words full, and it may do the King good, and no Hurt to any other but the Perſon attainted, and his Heirs, which the Statutes do all bar. Therefore bind not the new Statutes ſo to the Common Law, that their Words increaſed for the King's Advantage, ſhould be deprived of their Force, as in Conditions, Rights, Entries both upon 31 & 33 H. 8.

Dav. 15, a. Ante 48, 243.

10 Co. 37. a.

And touching the other Part of real Actions, I do diſtinguiſh, that if the Traytor, or his Heirs claiming as Heirs, be of the Time of his Attainder intituled to a real Action to the Lands of a Stranger; that the King ſhall not have this Right by Forfeiture of Treaſon: And ſo far goeth the Cauſe of the Marquels of Wincheſter, and no further.

3 Co. 2. a.

And therefore they put theſe two Caſes in general. If Tenant in Tail make a Feoffment in Fee, and then be attainted of Treaſon, this Right of Formedon in Deſcender againſt Diſcontinuee, is not given to the King to recover againſt him. So if Diſſeiſor die ſeiſed, and his Heir in by Deſcent, the Diſſeiſee is attainted, the King ſhall not have it; yet in Walſingham's Caſe, that very Point was in Effect adjudged contrary; for though in that Caſe Wyat was Tenant in Tail with Reverſion in the Crown that made the Feoffment; yet the Court in their Judgment took little hold of that Reaſon, but made it the general Caſe of a common Tenant in Tail, that makes a Feoffment, and then is attainted of Treaſon, that he hath ſtill a Right remaining in him, which his Heirs muſt claim from him, by a Deſcendit Jus, and therefore hath Power to forfeit. And it is to be noted, that in the Whole Argument of that Caſe, (though it Were argued by great learned Men on both Sides) there was no Man made Touch neither at Bar, nor at Bench, that ſuch a Right could not be forfeited, as now it is reſolved, which had made an End of the Queſtion; for it was in vain to diſpute, whether he had a Right or no (which Was made all the Queſtion) if he could not forfeit ſuch a Right, Whether he had it or not.

3 Co. 2. a. Cr. Car. 428. Ante 242. 12 Co. 6. 1 Cr. 429.

Ho. 5 ſo. b. 1 Cr. 428 Ante 337.

And it is Worthy the Noting, That the Marquels his Caſe, which Was Within ten Years after; for Wallingham's Caſe was 15 Eliz. in the Exchequer, and the Marquels his Caſe in the 25 Eliz. in the King's Bench: They relied mainly upon a ſpecial Reaſon of that Caſe, which was a Writ of Error to reverſe a Common Recovery, whereto the Perſon attainted Was intituled, as was pretended; and which the Queen would Claim by his Attainder, which they adjudged clearly ſhe could not have, becauſe it Was an Action of Privity, which could not be paſſed with general Words. And that they cauſed to be entered upon the Roll, as the Ground of their Judgment, omitting their other Reaſons, uſed in the Diſcourſe of their Arguments, which Was prudently done: For they took a ſure Ground for their own Judgment, and yet did they not expreſly croſs the former Judgment, becauſe the Caſes differed;

Plo. 552. b.

3 Co. 2 b.

7 Co. 13. a.

differed; upon which Reaſons alſo, though Conditions be given by the Statute of 33 H. 8. yet Conditions of Privity, and that are inſeperably inherent in the Perſon, are not given to the King, as it was reſolved in the D. of Norfolk's Caſe cited in Engleſield's Caſe.

I ſpeak not this as though I differed in my Opinion from the Rule of the Marqueſs's Caſe ſpecially taken, as there it is, of a Right of Action in the Perſon attainted, to the Lands of a Stranger, for the Reaſons there ſpoken of, and ſome others as ſtrong as thoſe, (viz.) theſe. That ſince a Forfeiture is a kind of Grant, and that meer Rights cannot be granted, it cannot be thought that the Statute meant to give Power to forfeit that which the Party had not Power to grant; that is to grant one a Right that he hath to the Land of another; which Reaſon is urged with that Diſtinction, Lampet's Caſe, Co. lib. 10. 48. And again the Scope of the Statute appears plainly to prejudice no Stranger, but to ſave their Eſtates, and Rights, fully, as if the Statute had not been made; Which could not be if the King ſhould be put in the Place of Subject, to purſue old and ſleeping Titles with a greater Strength than the Subject could, and tendeth to Maintenance of the Rights and Titles of Strangers, to the Prejudice of ancient and lawful Poſſeſſors; an Abuſe againſt Common Law, and againſt the Current of all Statutes in all Ages.

But now if any Man ſuppoſe that the Caſe of the Marqueſs, or the Law doth warrant a general Concluſion, that no Right of Action of the Perſon attainted is given to the King, I ſay he is in a plain and dangerous Error, in the Conſtruction of theſe Statutes, to the Wrong of the King and the Commonwealth, for they make but one, and to the prepoſterous Favour of great Malefactors and Peſts of the State.

8 H. 7. 1. per Keble.

Nothing is more natural than to marry, and reduce Rights to their Poſſeſſions, therefore nothing worſe than to ſever them, and therefore as I do allow that Opinion in the Marqueſs's Caſe, and the Reaſons for it as before, So I am utterly of another Mind in thoſe Caſes, where by the Forfeiture, Right of Action in the Perſons attainted may come to the Poſſeſſion of the King to confirm it; or where it goeth with the Poſſeſſion that is forfeited to the King, to eſtabliſh it, and can be otherwiſe of no Uſe, being kept from the King, but to defeat and defraud the King for the Benefit of the Perſon attainted, expreſly againſt the Letter and whole Scope of the Statute, that ſhuts him out of the Saving, and all Hope. So the Words ſhall work like to Littleton, Title Confirmation 531. The Diſſeiſor gives Land by Deed without Livery to the Diſſeiſee being Tenant; this confirms the Land and State, and yet the Word is Land not Right, give Land, not confirm it.

Dy. 222.

And therefore I put this Caſe for Example which no Man can deny; that Tenant in Tail diſcontinues, and the Diſcontinuee conveys the Land to the King, and then the Tenant in Tail or his Iſſue is attainted of Treaſon, the King ſhall have this Right to work by Way of confirming his Eſtate.

But I agree, that if the Diſcontinuee in that Caſe did convey the Land unto the King but for Term of his Life, with the Remainder over to a Stranger: And the Tenant in Tail or his Iſſue, were attainted, that though the King ſhould enjoy his Eſtate confirmed, yet the Remainder ſhould lie open to the Right of Entail.

Mo. 319.

But turn the Caſe, that the Diſcontinuee did convey the Land to I. S. for Life, the Remainder to the King in Fee; and then the Attainder had followed, the King's State is confirmed, and by Conſequence the Eſtate of the Subject; for Life that ſupports it cannot be impeached; for the Forfeiture is given to the King, and to no other but for the King's Good: And that anſwereth my Brother Hutton's Objection, that the Right of the old Entail might be larger than the preſent Entail that was to be forfeited, and therefore ſhould not be intended to be forfeited, together with the Eſtate in Poſſeſſion; for the King ſhall have Uſe of ſo much as concerns him, but it ſhall not be uſed for the Benefit of any other beſides the King: For no Forfeiture is given to, or for any other, neither ought any Right of Action to be given to the King, that may be uſed againſt a Stranger, but againſt the Offender himſelf it is clear

contrary, both becauſe his Rights are given to the King, and he and his Heirs expreſly excluded out of the Saving from thoſe Rights.

Hitherto we have ſpoken of naked Rights of Actions which the Perſon attainted may have to the Land of a Stranger, or to the Land of the King himſelf.

Now we will ſpeak diſtinctly of Rights real, that the Perſon attainted hath in his own Land, whereof he is ſeiſed, and which he is to forfeit by his Attainder, which Right is other and more ancient and better than that whereby he hath and holdeth the State and Poſſeſſion, whereby he is ſeiſed at the Time of the Attainder, which is the very Caſe now in Queſtion, whether the Heir of the Perſon attainted ſhall have any Advantage of ſuch a Right to defeat the Eſtate and Poſſeſſion that the King takes by Force of the Attainder and of theſe Statutes or either of them, whereof the Statute of 26 H. 8. the particular Statute of 31 H. 8. ſpake ſo clearly and definitively, that to diſpute it is a made Queſtion where none is; and the Caſe of the Lord Lumley which was cited out of Cook l. 3. 10. is nothing to this Purpoſe. Ayel, Pere, Fitz, le Pere en vie del Ayel, is attaint de Treaſon, the Father dies, then dies the Grandfather; the Son ſhall inherit from him. This is clear; for the Statute of 26 H. 8. chap. 13. gives a Forfeiture of the Lands of the Perſon attainted, which cannot prejudice the Son in that Caſe, becauſe his Father which was attainted, had nothing in the Land at the Time of his Attainder, but the Grandfather who was not attainted, and from whom he may convey the Tail, by the Help of the Statute of Weſtminſter the ſecond, of Intails; whereas here it is plain, that the Perſon attainted was ſeiſed of that Land in Queſtion in Tail, which is forfeited full within the Words and Meaning. 1 Cro. 428. 3 Cr. 28.

And I hold plainly in this Caſe, That as his Land in Poſſeſſion is diſtinctly and literally given to the King, ſo the Right is as directly and plainly given by way of diſcharging the Land, as to the King's Eſtate of that antient Right, whereof it was meant to be freed: And ſo the State given unto the King eſtabliſhed by it. For now when the Law ſaith, that the King ſhall have the Land, ſaving the Right of all Perſons, other than the Offenders and their Heirs, and ſuch as Claim to their Uſe: It is plain that the Eye of the Law-makers was not only upon the Lands in Poſſeſſion, but alſo upon the Rights to the ſame: The one, viz. the Land in Poſſeſſion, in Point of Giving, the other in Point of Saving, or Barring. 1 Cr. 428. Heel. 356. 2 Co. 6. Plo. 561.

The Land in Poſſeſſion given could be but in one, that is in the Offender, and ſo it was given. But Right in the ſame Lands might be in ſundry Perſons, in the Offender, or in his Heirs, or in Strangers.

Now then the Law ſaith, That the King ſhall have the Lands, always Saving the Rights of Strangers. But without ſaving the Right of the Offender or his Heirs, or any claiming to their Uſe: which is as much as to ſay, that the King ſhall have the Land without Saving, &c. or excluding, &c. or freed or diſcharged of the Rights of the Offender, or his Heirs, or againſt the Offender and his Heirs in Fee, or of Fee-tail, ſo if it had been Saving to all Strangers all their Rights, &c. and the (other then) which breaks the Sentence had been utterly omitted, the Strangers had been provided for, and the Privies excluded; if the Words had been all in the Purview that are divided in the Purview and Saving, it had been full, as to ſay, That the Offender ſhall forfeit the Land againſt him and his Heirs, omitting the Saving to Strangers. And Aucupia verborum ſunt judice indigna. And therefore where it was ſaid, That the Word of diſcharging the Right of the Heir in Tail, was a new Invention, and that there was no Word of barring or diſcharging the Rights of the Offender, and his Heirs in the Statute, as there is in the Statutes of Fines, it is plainly miſtaken; for it is the ſame (joining the Purview and Saving with the Excluſion of Rights of Heirs together) with the Word of diſcharging as hath been ſaid, except we think that the ſame Thing cannot be ſpoken but in the ſelf ſame Words.

Note

Note, That the Statute of 31 H. 8. gives Rights in the Purview actually, as well as Land, and again diſcharges it, by excluding it ſtrictly the Saving.

For Example, Tenant in Tail, diſcontinues and diſſeiſes his Diſcontinuee, and is attainted of Treaſon, he forfeits his Land gained by Diſſeiſin, and his Right of Entail he cannot uſe againſt the King by force of theſe Statutes.

And this ſtands with the Rule and Reaſon of the Marquels's Caſe: For Contarior' contraria eſt ratio. The Traitor's Right to the Land of a Stranger ſhall not be given to the King, for the Quiet of a Stranger being poſſeſſor: Therefore it ſhall be given to the King being Poſſeſſor, for the Quiet of his Poſſeſſion. And the Word of Hereditament in the Statute of 26 H. 8. and the Word of Right it ſelf, in the Statute of 31 & 33 of Hen. 8. are both ſufficient and fit to carry ſuch Rights in ſuch Caſes. And no Man will diſpute but that the Words are full and ſufficient to carry even naked Rights to the Land of Strangers. And therefore it is not for want of Words that they paſs not, but becauſe it was adjudged that it was not meant. And ſo it was ſaid in Doughtie's Caſe; ſo you have an Equity for the Good of the Subject againſt the King expreſly againſt Letter.

Therefore think it not ſtrange that nothing be loſt for the King, where both Letter and Meaning, and Equity are for him. And can any Man conceive that the Parliament that gave the Land to the King, ſhould leave a Right to the Traitor to the ſame Land, to defeat him of it again, ſince the Statute gives the Land, and alſo the Right, and the Saving excludes his Right again.

And this Point concerning the Forfeiture and Extinguiſhment of all Manner of Rights of Perſons attainted of Treaſon, and their Heirs for the Benefit of the King's Forfeiture, is of ſo great Importance, that if it be not taken at large as I take it, it is an Eluding of all the Statutes, even that of 33 H 8. cap. 20. For though that hath the Word Rights, ſo hath 31 H. 8.

And it is agreed on both Sides, that the Word (Rights) in both Statutes doth not include the Right of Action to the Land of Strangers, by an Equity againſt the Letter. But if you, ſhall agree alſo that it ſhall not extend to old and ſtale Rights, that the Perſon attainted may have to the King's Lands, howſoever the King hath the Land or the Rights, which the Perſon attainted hath buried in his own Land, which he doth forfeit upon theſe Statutes, you open a Wide Door to every Perſon that purpoſeth Treaſon, to make Proviſion before-hand, that though you get ſome State in his Land, yet he will have ſome ſecret Right to fetch it away from you again. So that where the Statute of Entails may be truly ſaid to be a real and perpetual Aſylum for Traytors and Treaſon it ſelf, which Sanctuaries could not be put for the Perſons of Traitors only: So theſe Statutes that do ſubject States in Tail to Forfeiture of Treaſon may be ſaid to kill Treaſon it ſelf, occidere ipſam proditionem. As the Tyrant Was ſaid to kill Presbyterium, when he took away their Livings. And conſequently this Miſinterpretation ſhall in Effect build this Tower of Confuſion; for who ſeeth not how many deſperate Perſons (as all Traitors are) who fear not to hazard themſelves for the compaſſing of their Wicked Ends, ſo they may preſerve their Poſterity, and their Eſtates, to preſerve them in Glory that ought for ever to be infamous? And therefore this Queſtion is pro aris & focis to treaſonable Deſigns.

In good Faith, nimium altercando veritas amittitur: And I find that when a Man admits Diſputation it lets in Doubting, that the Clearneſs of the Caſe needed not: For what is all this but where the Statute ſaith, That the Perſon attainted ſhall forfeit his Land entail to the King and his Heirs, ſc. from and againſt the Offender or his Heirs, It is ſaid he ſhall not do ſo, neither ſhall the King have it, but the Offender and his Heirs ſhall retain it; And ſo the Right expreſly given and expreſly contradicted, as to conſtrue volumus, id eſt nolumus.

And now to give Anſwer by the Way, to a Point ſtirred, with much Aſſurance on the adverſe Party which was thus: Katharine the Wife of Bigod during her Time was ſeiſed of an Eſtate ſubject to the Formedon of the next Heir upon the ancient Entail, whereupon he might have recovered, and then he muſt have been ſeiſed of the old Entail, which was Paramount the King's

Title, and ſo ſhould in Effect have evicted the King's Eſtate as well as hers, and then its ſaid, that the Cauſe is all one of Remitter and Recovery.

To this I Anſwer, that if I may take my Caſe, I will make the Law for my Caſe; and ſo this Caſe is made at Pleaſure, as the Party would have it, for there is no ſuch Caſe; but if there were ſuch an one, it is true, that the Woman would have much ado to defend her ſelf; for ſhe could not claim any Defence by the King's Title, under whom ſhe claims not, and alſo 'till the Office were found the Right was in the Heir, who muſt implead his Mother, and after her Death, both Poſſeſſion and Right were, according to the Caſe of the Marqueſs, in the Heir, and ſo was found, and alſo the Remitter, de facto was in Force. But now, and ever ſince the Office, the Caſe cometh Right between the KING and the Iſſue, which is juſt, that either Party may plead and defend his Cauſe himſelf. Poſt. 347.

This Objection alſo doth receive divers Conſiderations and Anſwers; for firſt, ſince the ancient Title of the Iſſue is extinct by the Statute, together with the Husband's Eſtate Tail, which is barred by the Attainder againſt him, and his Iſſue and the Wife's Eſtate, as a Stranger by Survivor, not claiming under her Husband, nor under that Eſtate is ſaved, in point of Contingency, if ſhe ſurvived, and not elſe, whereof this Iſſue can take no Advantage, for he is no Stranger within the Saving.

And this appears to the Court, the whole Caſe being found, or pleaded ſpecially by the Woman, that though the Woman, be ſufficient Tenant to the Præcipe, yet the Son is no ſufficient Demandant, for he muſt demand the old Intail, which he cannot have, becauſe it was extinct by the Statute, and a new, or leſs Eſtate he cannot Claim, for that is not his true Eſtate, as in Dalimore's Caſe of Feoffees to Uſes, 15 & 16 Eliz. Dyer 329. So the Wife's new Eſtate is ſafe, becauſe the old Eſtate and Title is gone, and the King cannot claim by that old Right againſt her, becauſe it is not given him by the Statute, to the Prejudice of her being a Stranger (as hath been ſaid) but by way of Extinguiſhment in his Poſſeſſion, for the eſtabliſhing ſo much of the new Eſtate as he takes by the Forfeiture and the Statute. And alſo becauſe the King's Title and the Wife's are from one Root, the Wife's Eſtate ſhall not be impeached, leſt the KING thereby ſhould be hurt. Again, if it be ſaid, that though the Right ſhould be ſaid to be extinct by the Statute, yet that ſhould be only as to the King, becauſe the Land is given to him diſcharged of the Title, and ſo there were no Defence for the Woman in the Formedon. Ant. 199.

I anſwer, that as to this Imagination of a Formedon, between the Son and the Wife, and a Recovery upon that, and ſo to ſee how that ſhould work upon the King's Title, to prevent it upon the Death of the Woman, who could not defend her ſelf by the King's Title, though it be good.

I anſwer, and ſay firſt, that there is no ſuch Point in the Caſe, but the Wife's Eſtate continues ſtill after her Death, and it is a Part of that latter Eſtate and Tail, which is forfeited. And whereby the King Claims, and ſo it ſupports the King's Eſtate.

Touching the Point of Remitter, it muſt have two Things, that is, an Eſtate in Poſſeſſion, deſcended from KATHARINE to her Son, of her Eſtate Tail, and to that muſt be joined a Right of the ancient Intail.

Now touching the Forfeiture of Lands in Tail before the Statute of 33 H. 8. ſcilicet, upon the Statute of 29 H. 8. or 31 H. 8. I am of Opinion in general, that the Land of Tenant in Tail ought to come to the King in an Attainder of Treaſon, upon the Death of the Perſon attainted without Office, ſo as the Heir in Tail ſhall not inherit, notwithſtanding the Opinion of Doughtie's Caſe, that the Land in Tail ſhall deſcend, notwithſtanding the Attainder, 'till the Statute of 33 H. 8. becauſe the Blood is not corrupted by the Attainder. So I hold that Opinion that is called a Reſolution, to be but a Matter of Diſcourſe, and no Point of Judgment, or pertinent to the Judgment of that Caſe, and to be erroneous. For it is Plain, that Tenant in Tail with Reverſion in the Crown, if he be attainted, his Blood is corrupted, and his Eſtate Tail ceaſeth upon his Death, and the Land rever- Ant. 331. 2 And. 34. 3 Co. 10. b. Dy. 327. Plo. 358. b. 1 Co. 122. b. 10 Co. 115. a. Plo. 394. b. Plo. 559. a.

teth to the King in Poſſeſſion. And that is the Judgment of Auſtin's Caſe 1 & 2 Ph & M. Plowden, Walſingham 560. which went ſo far as to avoid a Leaſe made by Tenant in Tail, though he left Iſſue, which I muſt confeſs, was an hard Strain, and ſo was Sir Nicholas Carew's Caſe ruled, 16 Eliz. Dyer 332. where Wray, Dyer and Sanders give Opinion upon an Award, that the Intail in ſuch Caſe is Extinct, and the Heir diſabled; for, he is an Iſſue, but no Heir.

Dy. 107. b. 115. a. Yel. 150. Ant. 324. 2 Ro. R. 491. Bridgm. 27. 1 And. 39.

Therefore this Poſition is not true generally, that Attainder of Treaſon doth not corrupt in Intails, but that they ſhall deſcend 'till Office found.

But now it is true, That where Tenant in Tail, the Reverſion to a Subject, is attainted of Treaſon, there is no Corruption of Blood, for then there muſt be a Ceſſer of the Eſtate Tail, which would work expreſly contrary to the Statute which gives the Eſtate to the King, whereas by the Ceſſer it ſhould accrue to him in the Reverſion.

So there is a Corruption or no Corruption, for ſeveral Reaſons, in ſeveral Caſes upon the ſelf ſame Words of Forfeiture; for there is no Word in the Statute of 26 H. 8. of Corruption of Blood in either Caſe. If you ask me then, by what Rule the Judges guided themſelves in this diverſe Expoſition of the ſelf ſame Word and Sentence?

I anſwer, it was by that Liberty and Authority that Judges have over Laws, eſpecially over Statute Laws, according to Reaſon and beſt Convenience, to mould them to the trueſt and beſt Uſe, and ſo to give the King his Intail, where himſelf is in Reverſion, to his beſt Advantage, by way of Extinguiſhing and Ceſſer; and where he is not in Reverſion, to give him the Tail by one Que eſtate, and both by the ſame word of Forfeiture, whereof I make this Conſequent; that as thoſe Judges do expound the Law to the beſt for the King in that Caſe, without any Help of Words, ſo we may with more Reaſon Judge, that this Law of 26 H. 8. and 31 H. 8. that makes Intails forfeitable for Treaſons, as Fee-ſimples, that in both Caſes, upon the Death of the Offender, the Heir ſhould be diſinherited, and the King ſhall have the Land immediately, though in both Caſes, of Fee-ſimples and Tail, the Offender himſelf ſhould receive it during his Life, becauſe Freeholds are not removed without ſome Ceremony of Law, as Office, Entry, Execution upon Judgment, or the like.

And obſerve, that about this Time the Eſtates Tail were by the Satute of 33 H. 8. made plainly liable to the Fines of Tenants in Tail, as Fee-ſimples; and ſo by the Statute of 26 H. 8. the Tenant in Tail is made alſo to forfeit the whole Eſtate by Treaſon, as Tenant in Fee. And for more Clearneſs of Meaning, they only ſave the Rights of Strangers, and exclude the Heirs as Privies, even as the Statute of Fine does; ſo as by the true Meaning of 26 H. 8. neither Land nor Right in this Caſe ſhould accrue to the Heir, but both to the King: And by Conſequence there ſhould be no Remitter to the Heir, in whom new Poſſeſſion and old Right muſt meet to make a Remitter.

And I reaſon this upon the Statute of 26 H. 8. that gives the Forfeiture of Tails; that if the Statute of Weſtm. after the Purview, that Tenant of Fee-ſimple conditional, ſhould have no Power to alien, ſhould have ſubjoined a Proviſo, that if they did commit Treaſon, they ſhould have forfeited as they ſhould have done before the Statute. Notwithſtanding I hold then, that as to the Forfeiture of Treaſon, it ſhould have remained ſubject to all Purpoſes, as before this Statute, as well to Forfeiture of Eſtate, as to Corruption of Blood.

Now as that Clauſe had not ſuffered the Caſe to come within the Statute of Weſtm. ſo this Statute of 26 H. 8. takes it out of the Law again, by the Contrary Means of that whereby it was brought in; that is, that whereas the Law did diſable him, under the Word of Reſtraint of Alienation to bear its Iſſue, and yet doth not give him Power to corrupt the Blood, not for any Care of him, or of his Blood; but becauſe that had wrought expreſly againſt the End of the Law, as is ſaid before.

Alſo

And the Reason used in Doughtie's Case is of no Value; for it is not the Corruption of Blood, that doth bring the Land to the King, for then Restitution of Blood would restore the Land to the Person attainted, and his Heirs, which it doth not though it be by Parliament, as appears by all the Acts of Restitution in Blood only, and in the very Case by the Restitution of Blood to Ralph Bigod by Parliament. 3 Co. 10. b. 1 Le. 157, 221.

Also the Land is forfeited by Attainder ipso facto, so that the Lord may enter by Force of the Forfeiture, which gives the Title against him for the whole Estate, so that the Heir is involved in him, and the Descent intercepted and prevented by the State given away by the Forfeiture, not by the Corruption of Blood.

But now to the Point, which I make the third in this Case. Admit that an Office were so requisite in this Case, that both Land and Right should descend to the Heir for want of it, as is the Opinion in Doughtie's Case, and so work a Remitter in him for the Time; yet I am of Opinion clearly, that this Remitter was but temporary, 'till Office found, and that when Office was found, both State, Possession and Right, vested in the Crown by Force of the Statute of 26 H. 8. and of the Attainder according to the State and Right that the Person attainted had in it at the Time of his Attainder. And this is just, both for the King and the Subject, that since the King's Title was just and true, and ought by his Officers to have been promoved and found in due Time, which if it had been clear for him against the Heir, as is confest, it is no Reason that the Negligence of his Officers, and perhaps their Compact and Combination with the adverse Party, should defeat the King. Vigilantibus & non dormientibus jura subveniunt, is a Rule for the Subject; but nullum tempus occurrit Regi, is the King's Plea, except it be in some Tride, as Usurpation, ad Death upon his Lapse, or the like. And put the Case that the Statute of 26 H. 8. had said, that if a Tenant in Tail of Lands be attainted of Treason, then upon Office found, the King shall have the Land; would any Man have doubted, but that tho' the Attainder had not given the Land presently, but that it must have descended to the Heir 'till Office? Yet upon Office found, the King should have taken the Land from him; and this Case in Question is in Effect the same; and in the very Point, the Case 3 E. 4. 25. of the Earl of Northumberland's, cited in Nichols's, Case 489. is thus: A Man disseises the King's Tenant, and the Disseisor is attainted of Felony, and before Office the Disseisee entereth upon the Land (as he may) now clearly the Disseisee is remitted. Then the Office is found for the King. It is agreed in the Book, and now on both Sides, that the Remitter is defeated, and that the Possession and Land is given to the King, as it was in the Person attainted, and the Right remains to the Disseisee to be pursued and recovered against the King, and so every Man hath his Due, and no Wrong done either to the King or to the Subject, for the King's Title was to the Land by the Attainder, not by the Office, which did but find the Title, not give it, and that was his Due; and the Disseisee's Due was the Right that remained to him, notwithstanding the Disseisin, and the Attainder, and the Office. And it is against Reason, that since the Office was devised by Law for an Authentical Means, to bring the King to Land by solemn Matter of Record, suitable to his Regality, and for the Safety of the Subject, that he should not enter or seise the Lands of the Subject upon Surmises, without Matter of Record, that this should be so bound to Times, that if he keep not his Instants, he should lose his Land for ever. And the Case of 3 E. 4. is much stronger than this Case in Question; for there the Disseisor might forfeit the Land (for it was his) but the Right was not his, but the Disseisee's, whereas in the principal Case, Francis Bigod hath both Possession and Right, as hath been proved, and so forfeited both to the King.

3 Point. Ant. 152, 166, 345. Ant. 230.

And this Case was heretofore brought to Consultation of all the Judges, 34 Eliz. Sir Edward Cook made the Entry in Writing, which is extant, but without the Parties Names; the Copies whereof have been seen by us all; wherein the Case being put (as hath been said) without Names, the Question was made, whether Queen Elizabeth, or the Heir should have the Land. And three great Objections were made against the Queen, that now are. 12 Co. 6.

First, that here the old Right could not be forfeitable to the Crown by the Statute of 26 H. 8. as was resolved in the Marquess's Case.

Secondly,

Secondly, that the Perſon attainted had not that Right by Reaſon of his Feoffment, and therefore could not forfeit it.

2 Co. 53. a. Thirdly, that the Heir was remitted by the Deſcent of the Land, and the ancient Right meeting together in him, and the Book of Plowden, Nichols's Caſe 489. a. cited, that if the Diſcontinuee convey to the King, and he grant it to the Diſcontinuor for Life, the Remainder to the Iſſue in Tail, that when it cometh to him he ſhall be remitted, and the King's Eſtate avoided. But the Judges una voce reſolved, that becauſe here was an actual Eſtate in Tail in the Perſon attainted, at the Time of his Attainder, that that Eſtate was plainly forfeited by the Statute of 26 H. 8.

Next, that the Rights of him and his Heirs had been bound by that Law, if there had been no Saving, and there was no Saving for them, becauſe they were excluded expreſly, and therefore they are bound by the Body of the Act. So there is a Diverſity between a naked Right of Action alone, and when an Eſtate of Inheritance is coupled with ſuch a Right, which, by the Forfeiture of the Eſtate in Poſſeſſion, is barred by the ſaid Act, and Excluſion of the Saving.

And laſtly, when this appears by Office, then the Iſſue in Tail is barred, notwithſtanding the Remitter; and therefore it differs from the Caſe out of Plowden of Remitter; for there the ancient Right in Tail was not barred.

Upon this Caſe the Biſhop of Lincoln Lord Keeper, and the Lord Lea Lord Treaſurer, having heard all the Arguments, gave Judgment for the King and the Lord Sheffeild, that the former Judgment given in the Exchequer ſhould be reverſed.

(415) The Earl of Ormond's Caſe.

This was about 15 Jac. 27 H. 8. cap. 10. Ant. 312. Dy. 166. Mo. 516.

The Earl of Ormond deceaſed, late Father to the Lord Dingwall's Lady; being Tenant in Tail of divers Manors and Lands in Ireland, &c. did ſuffer a Common Recovery, which was to the Uſe of his laſt Will, and afterwards by Writing under his Hand and Seal, did declare, that his Intent and Meaning then was, that the ſaid Recoverors, and their Heirs, ſhould ſtand ſeiſed of the ſaid Manors and Lands, to the Uſe of himſelf, and the Heirs Males of his Body, the Remainder to the Uſe of the Lady Elizabeth his Daughter (now the Lady Dingwall) and to the Heirs of her Body, the Remainder to the Right Heirs of the ſaid Earl. And after all this, the ſaid Earl and his Recoverors did make a Feoffment unto three Perſons, &c. and their Heirs, and limited new Uſes, two of which Feoffees had Notice of the ſaid former Uſes, and the third had not Notice thereof: Quid Juris?

The Caſe conſiſteth upon two Principal Queſtions.

1 Queſtion. 6 Co. 32. b. Co. L. 237. a. The firſt Queſtion, whether the Uſes limited by the ſaid Writing under his Hand and Seal, and whereby the Uſes in Remainder in Tail be limited to the ſaid Lady, be revocable or no?

For if they be revocable at the Will of the ſaid Earl, then he hath ſince made a Revocation de Facto, by limiting other Uſes, and ſo the Eſtate of the ſaid Lady determined; but if they be not revocable, then an Eſtate in Uſe in Tail, being fixed in the ſaid Lady, the Caſe by way of Admittance and Suppoſition will be further thus.

Ceſtuy que uſe in Tail to him, and to the Heirs Males of his Body, the Remainder in Tail to his Daughter, the Remainder in Fee to the Uſe of the Right Heirs of the firſt Cuſtuy que uſe; the ſaid firſt Ceſtuy que uſe, and the Recoverors, do make a Feoffment in Fee over unto three Perſons and their Heirs, and limit new Uſes; two of theſe Feoffees having Notice, and the third having no Notice of the firſt Uſes, and the firſt Ceſtuy que uſe afterwards dies: Whereupon the ſecond Queſtion is.

2 Queſtion. What Remedy the ſaid Ceſtuy que uſe in Remainder in Tail (which is the Lady Dingwall) hath to revive her ſaid Uſe, and to reſtore her to the ſame.

This

This Case was referred by the King to the two Chief Justices, Montague, my self, and Justice Doddrige, and this Report of it, made by us all to the King.

As concerning the first Question, it is thought by one of the Judges (sc. Montague) that the Remainder in Tail, in Use limited by the said Writing to the Lady Dingwall, cannot be revoked or changed by the said Earl and the Recoverors. The Reasons.

1. First, that although the first Uses upon the Recovery were to the Use of the last Will of the said Earl, and so to the Use of the said Earl and his Heirs, until he should express his Will and Intention concerning the same; yet when he had expressed his Intent and Meaning once by Writing, sealed and subscribed by him, and so once notified and published the same, and thereby given an Interest unto a third Person by Act executed, he can no more recall the same, as he might have done if the same Limitation had been by a last Will, which is still subject to Change.

2. The Limitation of Uses by this Writing, whereby the Lady claimeth, doth not rely upon the former Uses of the Recovery, nor doth relate thereunto, but seemeth rather to be deduced out of the free Disposition of the said Earl, by way of Donation and Gift settled, and not by way of his Disposition changeable. Dy. 49. b. 312. b.

It is conceived by the other two Judges, that the said Uses limited, or the said Writing, were revocable at the Will and Pleasure of the said Earl at all Times, and from Time to Time. The Reasons.

1. First, When a Conveyance is made to the Use of the last Will of him that maketh the said Conveyance, the Feoffees, or Recoverors in Use, in such a Case, stand seised in the mean Time to the Use of him that maketh the Conveyance and his Heirs, until Limitation be made of his Will and Meaning concerning the same. 6 Co. 18. a. 1 Cr. 39. 1 And. 246. Mo. 280. Ant. 312. Co. L. 271. a.

But nevertheless, whensoever he shall make any such particular Limitation, or Disposition of the said Uses, whether it be by a last Will, or otherwise by Deed or Writing, as long as he appointeth that the Recoverors, which were charged with the first Uses, shall stand seised to other Uses, and buildeth his new Limitation of Uses upon that former Foundation (being in this Case the Recovery) and as an Explanation of his Intention expresseth Uses, as in this Case he did by the said Writing, the said Uses are always revocable, because they are grounded upon the first Assurance, namely the Recovery, which was to the Use of his Will, which is always subject to Change. Kel. 129.

2. Secondly, the Recoverors in this Case were seised to the Use of his last Will, which is not to be understood a Testament only, but to be extended unto any other voluntary Disposition or Gratuity whatsoever, and the Uses limited to the said Lady do not contradict the first Limitation, (viz.) to the Use of his Will, or fix the same, but rather stand as an Exposition, how his Meaning in particular should be for the Time, and yet nevertheless still subject to the Change and Alteration of his Will, and that is agreeable to former Resolutions in Books in like Cases, and also agreeth with all the subsequent Acts of the said Earl. 19 H. 8. 11. Feoffment al use, Br. 1. 47. Testament, Br. 29. Dy. 166, 324.

As concerning the second Question, the said two Judges do agree in this.

That upon the new Uses declared upon the last Feoffment by the Recoverors, and the Earl being Cestuy que use, the new Feoffees cannot be seised but to the new Uses: But yet the two Feoffees, that had Notice of the first Use, are bound to make Recompence for the wrongful Change of the old Use; and because that turns to the Benefit of the said Earl, his Estate may well be made answerable for it. But for the other third Part, which is in the third Feoffee that had no Notice, there is no Remedy at all.

The Reason upon this latter Question is this.

Because the said Earl was Cestuy que use in Tail to him, and to the Heirs Males of his Body, and had the Use of the Remainder in Fee-simple, he and his said Recoverors had lawful Power to alter and change his said Use in Possession, during the Life of the said Earl, and the Fee-simple absolutely without Prejudice of any, and seeing that the said Cestuy que use, and his Recoverors, which are the Owners of the said Land in Law, have disposed

of the ſame by Feoffment, and have declared new Uſes upon the ſame Feoffment, there is no Remedy to revive the Uſe of the ſaid Lady by Courſe of Law, which muſt be by Re-entry of the Recoverors, which they cannot make in this Caſe contrary to their own Feoffment: But yet, for that a Wrong is done thereby to the ſaid Lady, they are bound to make to her, in Equity and Conſcience, a full Recompence for the ſame, which may well be drawn and had (as this Caſe now ſtandeth) out of the ſaid Earl's Eſtate, becauſe it turneth to his Advantage, as hath been aforeſaid.

Note, the King in his Award (for the Earls of Ormond and Deſmond were bound in one Hundred Thouſand Pounds a-piece, to ſtand to the King's Award) recited this Difference of Opinion, and that upon it he inquired the Opinion of ſome other Juſtices (of which Hutton was one) who agreed with Montague. But the Earl of Ormond knew not of it, neither were his learned Counſel heard to ſpeak before them, as they did before the firſt three. And the King in his Award, amongſt other Things, gave to the Lady three Manors (five Manors being controverted upon this Point) for her Part.

FINIS.

AN EXACT

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TO THE

Lord Hobart's REPORTS.

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